

# TRANSCRIPT OF RECORD

COURT OF THE UNITED STATES

IN THE DISTRICT OF COLUMBIA

IN RE: [REDACTED] 79

STATE OF MARYLAND, PLAINTIFF IN ERROR,

VS. [REDACTED] CHARGE OF [REDACTED]  
[REDACTED] AND [REDACTED] AS [REDACTED]  
[REDACTED] THE BOARD OF ELECTIONS [REDACTED]  
[REDACTED] AND [REDACTED] OF [REDACTED]

REPORT TO THE DISTRICT COURT OF THE DISTRICT OF  
COLUMBIA

FILED [REDACTED] 1916

[REDACTED]

(24,074)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 376.

ETHEL C. MACKENZIE, PLAINTIFF IN ERROR,

*vs.*

JOHN P. HARE, THOMAS V. CATOR, CHARLES L. QUEEN,  
WILLIAM McDEVITT, AND JOHN HERMAN, AS AND  
COMPOSING THE BOARD OF ELECTION COMMISSION-  
ERS OF THE CITY AND COUNTY OF SAN FRANCISCO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF  
CALIFORNIA.

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Copy.

In the Supreme Court of the State of California.

ETHEL C. MACKENZIE, Petitioner,

v.

JOHN P. HARE. THOMAS V. CATOR, CHARLES L. QUEEN, WILLIAM McDevitt and John Hermann, as and Composing the Board of Election Commissioners of the City and County of San Francisco, Respondents.

*Petition for Writ of Mandate.*

To the Honorable the Justice of the Supreme Court of the State of California:

The petition of Ethel C. Mackenzie, the above named petitioner herein, respectfully alleges and shows unto this Honorable Court:

### I.

That at all the times hereinafter mentioned, the above named respondents, John P. Hare, Thomas V. Cator, Charles L. Queen, William McDevitt and John Hermann, were the lawfully appointed and qualified election Commissioners of the City and County of San Francisco, in the State of California, and as such Board have exclusive power and authority to register and cause to be registered as voters in said City and County, all persons lawfully entitled to be registered as qualified voters in the said City and County.

### II.

That your petitioner, Ethel C. Mackenzie, is an American woman, born at Redwood City, in the State of California, and within  
2 the United States of America, and subject to the jurisdiction of the said United States of America, upon the third day of December, in the year A. D. 1885, and has ever since her said birth continuously resided and still resides in the State of California aforesaid, and she has never resided without said State, or without the said United States of America;

### III.

That upon the 14th day of August, A. D. 1909, your petitioner was lawfully married in the State of California aforesaid, to Gordon Mackenzie, who ever since the date of said marriage has been, and still is, the husband of your said petitioner and ever since the date of said marriage your petitioner has been, and still is, the wife of said Gordon Mackenzie;

## IV.

That at the time of said marriage the said Gordon Mackenzie was, and ever since has been, and now is a citizen and subject of the Kingdom of Great Britain, and is not now and never has been a citizen of the United States of America, but that at the time of said marriage the said Gordon Mackenzie was residing in the State of California, in the United States of America, and ever since the date of said marriage your said petitioner, as his said wife, has resided with him in the said State of California and still continues so to reside; and intends to continue to reside therein;

## V.

That on or about the 22d day of January, 1913, your petitioner applied to the respondents at the City and County of San Francisco, at the office of said respondents and the usual place for the registration of voters, in said City and County, to be registered as a voter in said City and County, in the manner required by the law of the said State of California, and that at the time of said application your petitioner was a person born as aforesaid, and of the age of more than twenty-one years, and has been a resident of the said State of California, for more than one year next preceding said application and a resident of the said City and County of San Francisco, for more than ninety days next preceding said application, and a resident of the precinct in said City and County in which she offered to be registered as such voter for more than thirty days next preceding said application, and was not an idiot, nor an insane person, nor a person convicted of any infamous crime, or of the embezzlement or misappropriation of public money, and was a person able to read the Constitution in the English language, and to write her name;

## VI.

That at the time of said application to be so registered as a voter, as aforesaid, your petitioner offered and was ready and willing to lawfully and truly make oath to all the facts aforesaid in the manner required by law, but the said respondents, as composing such Board of Election Commissioners, well knowing said facts to be true and not denying the same on or about said 22d day of January 1913, and before the commencement of this proceeding, did wholly and absolutely refuse to register your said petitioner as a voter in said City and County, or to permit your petitioner to be registered as a voter in said City and County, giving and assigning as the sole reason for such refusal that your petitioner was an American woman married to a foreigner, and that she was therefore and thereby barred from such right of registration by virtue of the provisions of an act of Congress of the United States of America, entitled, "An Act in Reference to the Expatriation of Citizens and their Protection

4      Abroad," approved March 2d, 1907; that your petitioner is informed and believes that the said Act of Congress, by reason of the facts aforesaid, and because your petitioner has never resided without the United States of America, has no application to your petitioner, and your petitioner is also informed and believes that if said Act of Congress applied to your petitioner, that the said Act in so far as its provisions relate to women born in the United States and subject to the jurisdiction thereof, to-wit: the provisions of Section 3 of said Act, are unconstitutional and void and upon such information and belief your petitioner avers that the said Act of Congress as to Section 3 thereof is unconstitutional, null and void, as being contrary to Section I of the Fourteenth Amendment to the Constitution of the United States;

### VII.

That your petitioner is the party beneficially interested in this proceeding and that she has no plain, speedy or adequate remedy at law and can only obtain such registration as a voter by virtue of the writ of mandate of this Honorable Court:

### VIII.

That initiative proceedings have been taken in said City and County whereby an election will be held therein in the near future, and other elections will be held therein within a time within which your petitioner will only be able to participate as a voter by the early issuance of the writ of mandate of this Honorable Court commanding the respondents to register your petitioner as a qualified voter in said City and County, and the reason this application for a writ of mandate is made to this Court, and not the Superior Court, or the District Court of Appeals, is because, this Honorable Court is the only tribunal which can hear and finally determine this application within the time necessary to protect the rights  
5      of suffrage of your petitioner;

Wherefore your petitioner demands the judgment or order of this Court, that an alternate writ of mandamus issue out of and under the seal of this Honorable Court, commanding the respondents, as such Board of Election Commissioners, immediately after the receipt thereof, to register your petitioner as a qualified voter in the said City and County of San Francisco, in the appropriate precinct therein, or show cause before this Honorable Court in banc at a time and place to be named in such writ why they, the said respondents, have not done so, and why said alternate writ of mandamus should not be made permanent, and that petitioner have such further order, judgment or relief as the nature of the case may require with costs.

MILTON T. U'REN,  
*Attorney for Petitioner.*

Dated, San Francisco, February 3d, 1913.

6      **STATE OF CALIFORNIA,**  
           *City and County of San Francisco, ss:*

Ethel C. Mackenzie, being duly sworn, deposes and says:

That she is the petitioner named in the foregoing petition, and that she has read the foregoing petition and knows the contents thereof, and that the same is true of her own knowledge, except as to those matters therein stated, upon her information and belief, and that as to those matters she believes it to be true.

**ETHEL C. MACKENZIE.**

Subscribed and sworn to before me this 3d day of February, 1913.

[SEAL.]

**ROBERT R. RUSS,**

*Notary Public in and for the City and County of  
 San Francisco, State of California.*

By the COURT: On reading and filing the within petition it is ordered that an alternative writ of mandate issue as therein prayed, returnable before the Supreme Court in banc at San Francisco on the 1st Monday of March, 1913, at ten o'clock A. M.

Feb'y 3rd, 1913.

**BEATY, C. J.**

7      Endorsed: No. 6455. In the Supreme Court of the State of California. Ethel C. Mackenzie, petitioner, vs. John P. Hare, et al., etc., respondents. Petition for writ of mandate. Copy. Filed Feb. 3-1913. B. Grant Taylor, clerk by Erb —, deputy. Milton T. U'Ren, Attorney for petitioner. 710-711 Mechanics' Institute Building, 57 Post street, San Francisco.

Copy.

8      In the Supreme Court of the State of California.

No. 6465.

**ETHEL C. MACKENZIE, Petitioner,**

**vs.**

**JOHN P. HARE, et al., Respondents.**

**Demurrer.**

Now come the Respondents in the above entitled proceeding and demur unto the petition of the Petitioner in this proceeding, and for cause of demurrer alleges and state:

That the said petition does not state facts sufficient to constitute a cause of action against the respondents or to entitle the petitioner to any relief.

Wherefore, the respondents demand that the said petition be dismissed and that respondents may have any other order which the nature of the case may require.

**THOMAS V. CATOR,**  
**WM. McDEVITT,**  
*Attorneys for Respondents.*

9 [Endorsed:] No. 6465. In the Supreme Court of the State of California. Ethel C. Mackenzie, petitioner, vs. John P. Hare et al., respondents. Demurrer. Copy. Filed Mar- 3, 1913. B. Grant Taylor, Clerk, By Dryden, Clerk. Thomas V. Cator, Wm. McDevitt, Attorneys for Respondents.

10 In the Supreme Court of the State of California.

*Affidavit of Service.*

ETHEL C. MACKENZIE, Petitioner,

vs.

JOHN P. HARE, THOMAS V. CATOR, CHARLES L. QUEEN, WILLIAM McDevitt, and John Hermann, as and Composing the Board of Election Commissioners of the City and County of San Francisco, Respondents.

STATE OF CALIFORNIA,

*City and County of San Francisco, ss:*

Fred J. Goble, being first duly sworn deposes and says:

That he is a white male citizen of the United States, over the age of twenty-one years, and is not interested in any way in the above entitled action;

That on the 18th day of February, 1913, at the City and County of San Francisco, State of California, he personally served the attached Writ of Mandate and a copy of the petition on file in said action, upon each of the above named respondents, to-wit, John P. Hare, Thomas V. Cator, Charles L. Queen, William McDevitt and John Hermann, as and composing the Board of Election Commissioners of the City and County of San Francisco, by delivering to and leaving with each of said respondents personally a true and correct copy of the petition on file herein, and a true and correct copy of the attached Writ of Mandate, and by exhibiting personally to each of said respondents the original Writ of Mandate issued in the above entitled cause.

FRED J. GOBLE.

Subscribed and sworn to before me this Third day of March, 1913.

JAMES F. McCUE,

*Notary Public in and for the City and County  
of San Francisco, State of California.*

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Copy.

In the Supreme Court of the State of California.

ETHEL C. MACKENZIE, Petitioner,

vs.

JOHN P. HARE, THOMAS V. CATOR, CHARLES L. QUEEN, WILLIAM McDEVITT and JOHN HERMANN, as and Composing the Board of Election Commissioners of the City and County of San Francisco, Respondents.

*Writ of Mandate.*

To the above named Respondents, John P. Hare, Thomas V. Cator, Charles L. Queen, William McDevitt, and John Hermann as composing the Board of Election Commissioners of the City and County of San Francisco, Greeting:

Whereas, it manifestly appears unto this Court by the petition of Ethel C. Mackenzie, heretofore duly filed in this proceeding, that the said Respondents constitute the Board of Election Commissioners of the City and County of San Francisco, and that as such Board the respondents have refused to register the said petitioner as a qualified voter in the City and County of San Francisco, in the appropriate precinct thereof, after lawful application by the said petitioner to be so registered:

Now, this is to command you, the said Respondents, as said Board, that immediately after the receipt of this Writ, you cause the said petitioner upon her proper application in person to be registered as a qualified voter in the said City and County of San Francisco, in the appropriate precinct thereof, in the manner required by law, or that you show cause before our Supreme Court in banc, at the rooms of said Supreme Court, in the Wells-Fargo Building, at the corner of Second and Mission Streets, in said City and County, upon the 3d day of March, 1913, at 10:00 o'clock A. M. of such day, or as soon thereafter as counsel can be heard, why you have not done so, and why this alternative writ should not upon such hearing be made permanent, and why the petitioner should not have such other or further order, judgment or relief, as the nature of the case may require, with costs.

Witness the hand of Honorable William H. Beatty, Chief Justice of our said Supreme Court of the State of California, and the seal of said Court this 4th day of February, 1913.

B. GRANT TAYLOR,

*Clerk of the Supreme Court  
of the State of California.*

[SEAL.]

By I. ERB, *Deputy Clerk.*

13 [Endorsed:] No. 6465. In the Supreme Court of the State of California. Ethel C. Mackenzie, petitioner, vs. John P. Hare, et al., etc., respondents. Writ of Mandate. Copy. Filed Mar. 3, 1913. B. Grant Taylor, clerk. By — Erb, deputy. Milton T. U'Ren, attorney for petitioner, 710-711 Mechanics' Institute Building, 57 Post Street, San Francisco.

*Supreme Court Decision.*

S. F. No. 6465. In Bank. Filed August 5, 1913.

ETHEL C. MACKENZIE, Plaintiff,

v.

JOHN P. HARE et al., as the Board of Election Commissioners of the City and County of San Francisco, Defendants and Respondents.

Application for Writ of Mandate, Prayed to be Directed Against John P. Hare et al., as the Board of Election Commissioners of the City and County of San Francisco.

For Petitioner—Milton T. U'Ren.

For Respondents—Thomas V. Cator, Wm. M. McDevitt.

Application in this Court for a writ commanding defendants, as members of the Board of Election Commissioners of the City and County of San Francisco, to register the plaintiff as a qualified voter of said city and county.

The plaintiff was born and ever since has resided in the state of California. On August 14, 1909, being then a resident and citizen of this state and of the United States, she was lawfully married to Gordon Mackenzie, a native and subject of the kingdom of Great Britain. He had resided in California prior to that time, still resides here and it is his intention to make this state his permanent residence. He has not become naturalized as a citizen of the United States and it does not appear that he intends to do so. Ever since their marriage the plaintiff and her husband have lived together as husband and wife. On January 22, 1913, she applied to the defendants to be registered as a voter. She was then over the age of twenty-one years and had resided in San Francisco for more than ninety days.

Registration was refused to her on the ground that by reason of her marriage to Gordon Mackenzie, a subject of Great Britain, she thereupon took the nationality of her husband and ceased to be a citizen of the United States. The soundness of this objection is the question to be decided.

The qualifications necessary to entitle a person to the privilege of suffrage and the right of registration as a voter in this state are fixed, declared and controlled by section 1 of article II of the state constitution as amended on October 10, 1911. The purpose of the amendment was to extend the privilege of suffrage to women. The portion of the section upon which the decision of this case depends is the opening clause, giving the privilege of suffrage to "every native citizen of the United States", who possesses the other qualifications mentioned in the subsequent parts of the section. It declares that persons having the qualifications stated shall "be entitled to vote at all elections". As it is admitted that the plaintiff possesses all the other qualifications required, the sole question presented is whether or not, upon the facts we have stated, she is a "native citizen of the United

States". If she comes within that definition she is entitled to registration as demanded.

She was a citizen of the United States prior to her marriage to Mackenzie. No event affecting her status as a citizen, except said marriage, has occurred since that time. She therefore still remains a citizen of the United States unless she has lost her citizenship by her marriage with an unnaturalized resident alien. (*Haunstein v. Lynham*, 100 U. S. 484.)

The status of persons as citizens or aliens, respectively, is controlled entirely by the constitution of the United States and the acts of congress passed in pursuance thereof. We must look solely to them to ascertain whether or not the plaintiff is a citizen and as such a voter entitled to registration. And in determining their meaning and effect the state courts are bound by the interpretation put upon them by the courts of the United States.

Prior to any legislation on the subject by congress there was some uncertainty and conflict of authority concerning the right of expatriation. The question first arose in 1795, in *Talbot v. Jansen*, 3, U. S. (Dall.) 133, 162, where Iredell, J., discusses it at length, stating his conclusion to be that a citizen could not denationalize himself without the consent of his government. The other justices expressed no opinion on the point. Similar views were stated in *Shanks v. Dupont* (1830), 3 Peters 246; *Inglis v. Sailors Snug Harbour* (1830), 3 Peters 101, 125, and in *United States v. Gillies* (1815), Peters C. C. 161. In *Shanks v. Dupont*, the court said, per Story, J.: "The general doctrine is, that no person can, by any act of their own, without the consent of their government, put off their allegiance, and become aliens." And on this ground it was held that the marriage of a woman citizen with an alien did not change her allegiance to the United States. There was, at that time, no legislation permitting expatriation. In *Stoughton v. Taylor*, 2 Paine C. C. 661, it is said that the right of expatriation is fundamental and inherent. To the same effect see *Alsberry v. Hawkins*, 39 Ky.

15 178. Other state courts were of the same opinion. The denial of the right of voluntary expatriation was somewhat inconsistent with the laws of the United States providing for the naturalization of foreigners, the first of which was enacted in 1779 (1 U. S. Stats. 103). The question was practically set at rest by the act of July 26, 1868 (15 U. S. Stats. 223; U. S. Rev. Stats., sec. 1999). The preamble thereof declares that the right of expatriation is a natural and inherent right of all people. The body of the act declares further that any decision of any officer of the Government denying, restricting, or impairing the right of expatriation is "inconsistent with the fundamental principles of this government". This language seems to be but little more than a legislative declaration of a national policy. But it clearly is operative in this, that it gives the consent of the national government to the expatriation of any citizen by his or her voluntary act. If such consent of the nation is essential to a valid expatriation, this law is evidence thereof. The absolute right of expatriation is now recognized as the settled doctrine of this country. (*Browne v. Dexter*, 66 Cal. 40; *Kane v. Mc-*

Carthy, 63 N. Car. 302; *Burton v. Burton* [N. Y.], 1 Keyes 359; 1 Abb. Dec. 271; *Kelly v. Owen*, 74 U. S. 496; *In re Look Tin Sing*, 21 Fed. 905.) In the case last cited the court says: "The United States recognize the right of every one to expatriate himself and choose another country." In view of the contention to be hereafter mentioned, it is to be noticed that this case was decided after the adoption of the Fourteenth Amendment.

The first legislation by congress in regard to the status of married women as citizens was the act of 1855. (10 U. S. Stats. 604; U. S. Rev. Stats. 1994). Section 2 is as follows: "That any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen." In the Revised Statutes the words "and taken" are omitted. The effect of this statute is that every alien woman who marries a citizen of the United States becomes perforce a citizen herself, without the formality of naturalization and regardless of her wish in that respect. (*Kane v. McCarthy*, *supra*; *Kelly v. Owen*, *supra*.) It is not entirely certain that, under our state constitution, such citizenship would entitle such foreign-born woman to vote. Our constitution confers that privilege only on three classes of persons; first, native citizens; second, those who became citizens under the treaty of Queretaro, or, as it is commonly called the treaty of Guadalupe-Hidalgo, and, third, naturalized citizens. An alien woman who marries a citizen thereby herself becomes a citizen, but there may be doubt if she thereby becomes a naturalized citizen within the meaning of the constitution. This is, of course, a question not here involved. We mention it only to call attention to the distinction and to make it clear that we have not decided it.

The act of 1855 determines the citizenship of an alien woman who marries a citizen. We have in this case the converse of the proposition; the effect of the marriage of a native female citizen to a man who is not a citizen, but is a subject of some other country. In *Pequignot v. Detroit* (1883), 16 Fed. 211, Judge Brown, afterward justice of the United States Supreme Court, decided that an alien woman who had become a citizen under the aforesaid act of 1855 by marrying a citizen, and who was divorced from that husband and thereafter married an unnaturalized alien, lost her citizenship by the last marriage and again became an alien, although both she and her last husband continued to reside in this country with the intention of remaining. In *Ruckgaber v. Moore*, 104 Fed. 947, decided in 1900, the court held that a native woman who marries a French citizen and thereafter resides with him in France thereby loses her American citizenship and becomes a citizen of France, adding, however, that to accomplish this result she must, by residence abroad, or other equivalent act, express her intention to renounce her former citizenship by her marriage. Similar views were expressed in *Trimbles v. Harrison*, 40 Ky. 147. In *Comitis v. Parkerson*, 56 Fed. 556, decided in 1893, the court held that a native born woman who had married an alien subject of Italy, permanently residing in the United States and intending to continue therein, did not thereby lose her citizenship but remained a citizen of this country. The court said

16 that the power to declare how the right of expatriation should be exercised, as well as that of naturalization, was exclusively in Congress, that expatriation could not take place without the consent of the United States, and that "Congress has made no law authorizing any implied renunciation of citizenship". It was mainly on this ground that the court rested its conclusion, although it was also said that in the absence of any law of Congress as to the method of expatriation, it could not be said to take place, unless it was manifested by a removal from this country and a residence elsewhere. (See also *Beck v. McGillis*, 9 Barb. 49; *Shanks v. Dupont*, supra; *Jennes v. Landes*, 84 Fed. 74; *Kreitz v. Behrensmeyer*, 125 Ill. 197-8.)

When an alien and a citizen intermarry, they not infrequently return to reside, either temporarily or permanently, to the country of the alien spouse, thereby giving rise to questions concerning their rights as citizens or aliens of the respective countries, from which there have ensued international disputes to be discussed and settled by diplomatic correspondence between the United States and the foreign country. The fact that the courts of this country have held variant opinions on some phases of the subject has caused some perplexity in the state department and like diversity of opinions has appeared from time to time in the correspondence of that department. All the courts have agreed, however, that the entire subject of naturalization and expatriation, including the method by which each might or could be accomplished and manifested, is a matter within the exclusive control of Congress. Under these conditions, the United States Senate, on April 13, 1906, passed a joint resolution for the appointment of a commission to "examine into the subjects of citizenship of the United States, expatriation, and protection abroad", and make a report with proposals for legislation thereon. In June, 1906, the house committee on foreign affairs, to which this resolution had been referred, requested the secretary of state to select three men connected with the state department, familiar with the subject, to investigate and make the desired report and recommendations. In pursuance of this request Honorable Elihu Root, then secretary of State, directed Mr. James B. Scott, solicitor for the department of state; Mr. David Jaynes Hill, then minister to The Netherlands, and Mr. Gaillard Hunt, chief of the passport bureau, to make an inquiry, report and proposals for legislation, as requested. These gentlemen proceeded and on December 18, 1906, they made an elaborate and exhaustive report of 538 pages, with recommendations for legislation covering all the phases of the subject except that of naturalization, which was already provided for. With this document before it, Congress framed an act which became a law on March 2, 1907. (34 U. S. Stats. 1228.) This act now controls the subject referred to, including that involved in this case. Section 3 thereof is practically decisive of the case before us and it is as follows:

"That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the

United States, or by returning to reside in the United States, or, of residing in the United States at the termination of the marital relation, by continuing to reside therein."

There is no escape from the conclusion that, under the provisions of this section, the plaintiff in this case, when she married Gordon Mackenzie, a British subject, thereupon took the nationality of her husband and ceased to be a citizen of the United States. Just as an alien woman who marries a citizen becomes a citizen herself whether she wishes it or not, as the cases we have cited declare, so a female citizen who marries an alien becomes herself an alien, whether she intends that result as the consequence of her marriage or not. She must bow to the will of the nation as expressed by the act of Congress. Owing to the possibility of international complications, the rule has generally prevailed, from considerations of policy, that the wife should not have a citizenship, nor an allegiance, different from that of her husband. The section aforesaid was intended to put this general doctrine into statutory form. When, after Congress by this act had declared that her marriage to an alien would accomplish her expatriation, and she thereafter married an alien, she is conclusively presumed to have intended thereby to renounce her citizenship of the United States and become a subject of Great Britain.

It is suggested that the object of the act, as expressed in its title, was to legislate solely for the protection of citizens abroad and therefore that it should not be construed to apply to women who  
17 marry here and continue to reside in this country, or who marry an alien permanently residing in this country. As has been stated in reciting the origin of the act, such persons frequently remove to the country of which the husband is a subject, or to other foreign countries. It was the obvious purpose to provide a rule which should govern in cases of that kind. Furthermore, the language of the section shows that it contemplates that an American woman included within its terms will in some cases reside in the United States after contracting the marriage with the alien, and that it intends that she shall continue to have the nationality of her husband during such residence here, so long as the marriage relation continues. The interpretation contended for would be contrary to this provision, and therefore it is not permissible.

Plaintiff's counsel also contends that the act of Congress is contrary to the opening sentence of the fourteenth amendment to the constitution of the United States declaring that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside". In support of this position they cite *In re Look Tin Sing*, supra, and *United States v. Wong Kim Ark*, 169 U. S. 649. In the first mentioned case, which was decided in 1884, Justice Field of the United States Supreme Court, writing the decision for the circuit court of the United States for the district of California, held that a person born in the United States, of Chinese parents residing therein at the time of his birth and not members of the diplomatic force of China, was a native citizen of the United States and was not subject to the act of Congress forbidding the re-entry into this country of

Chinese who had returned temporarily to China, except where they had obtained a certificate allowing such return. This decision declares that a native born person of any race is a citizen, under the aforesaid provision of the fourteenth amendment, and it follows the familiar rule that such person remains a citizen so long as he chooses, provided he does no act which under our laws will have the effect of renouncing or forfeiting such citizenship. The Chinese exclusion act, it was held, did not affect the right of citizenship. But the quotation we have already given from this case shows that the court did not intend to hold and did not hold that the fourteenth amendment forbids expatriation, or takes from Congress the power to legislate concerning it. In *United States v. Wong Kim Ark*, the same question was involved and the same conclusion was reached. In the course of its very elaborate discussion of the proposition that the fourteenth amendment affirms the "ancient and fundamental rule of citizenship by birth within the territory" (p. 693), the court said (p. 703): "The power of naturalization, vested in Congress by the constitution, is a power to confer citizenship, not a power to take it away." From this remark it is argued that a native born citizen cannot, since the adoption of that amendment, renounce his citizenship. But this by no means follows: The court in the quoted sentence was speaking of the power of Congress to deprive a person of his citizenship without his consent and for no sufficient or reasonable cause. In the next paragraph of the opinion the court says (p. 704): "Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents or of any other country." Thus the opinion relied on itself recognizes and declares that citizenship may be renounced, notwithstanding the provisions of the fourteenth amendment. As we have held that the act of the plaintiff here in marrying an alien was in effect a renunciation of her citizenship, it follows that she is not prevented from committing this act of expatriation by the aforesaid provision of the fourteenth amendment.

We think it advisable to state here that the question of the effect of the marriage of a native female citizen to an alien, where such marriage had taken place before the passage of the act of 1907 aforesaid, is a question not involved in this case. It is not therefore to be deemed as a decision upon the question whether the section of the act of Congress above quoted was applicable to and operated upon citizens of the United States who were at that time married to alien husbands. From what we have said the conclusion is clear that the plaintiff here is not now a citizen of the United States within the meaning of the act of Congress above quoted, and as that act controls the question of her citizenship, and her right to vote is made by our constitution, as amended in 1911, dependent upon her status as a citizen of the United States, and does not exist unless she

18 is such citizen, she is not entitled to the exercise of the privilege of suffrage and cannot demand registration as a voter.

It is ordered that the writ applied for be denied.

SHAW, J.

We concur:

ANGELOTTI, J.  
LORIGAN, J.  
SLOSS, J.  
BEATTY, C. J.  
MELVIN, J.  
HENSHAW, J.

19 [Endorsed:] No. 6465. In the Supreme Court of the State of California. Ethel C. Mackenzie, Plaintiff and Appellant in Error, vs. John P. Hare et al., Defendants and Respondents in Error. Written opinion. Filed Aug. 5, 1913. B. Grant Taylor, Clerk. By Dryden, Deputy. Milton T. U'Ren, Attorney for Petitioner, 710-711 Mechanics' Institute Building, 57 Post Street, San Francisco.

20 In the Supreme Court of the State of California.

S. F. 6465.

MACKENZIE  
v.  
HARE et al., etc.

By the COURT: Rehearing denied, September 4, 1913.

21 Copy.

In the Supreme Court of the State of California.

No. 6465.

ETHEL C. MACKENZIE, Plaintiff and Appellant in Error,  
vs.

JOHN P. HARE, THOMAS V. CATOR, CHARLES L. QUEEN, WILLIAM McDevitt and John Hermann, as and Composing the Board of Election Commissioners of the City and County of San Francisco, Defendants and Respondents in Error.

*Petition for Writ of Error.*

To the Honorable Chief Justice of the Supreme Court of the State of California:

Ethel C. Mackenzie finding herself aggrieved by the final judgment of this Court made and entered herein on the 5th day of August, 1913, against her and in favor of defendants, wherein was drawn in question a title, right, privilege or immunity claimed by

Petitioner under the Constitution of the United States and of a statute of the United States and especially under Section I of the Fourteenth Article of Amendment to the Constitution of the United States and also that certain Act passed by the Congress of the United States on the 2d day of March, 1907, and entitled, "An Act in reference to the expatriation of citizens and their protection abroad,"

petitions this Honorable Court for a Writ of Error;

22 That this Court by its final judgment herein passed upon a Federal question, to-wit:—the citizenship and rights of Petitioner as a native citizen of the United States, under the Constitution of the United States and the said Act of March 2d, 1907, entitled, "An Act in reference to the expatriation of citizens and their protection abroad;"

That this Court decided said case upon said Federal question and upon no other grounds;

In petitioning this Honorable Court for a Writ of Error, your Petitioner claims the right to remove said Judgment made and entered in this cause by this Court to the Supreme Court of the United States by a Writ of Error, under Section 237 of the Judicial Code of the United States passed by the Congress of the United States on the 3rd day of March, 1911, (36 Stat. B. 1156) for correction, on the ground that there was drawn in question the construction of Section I of the Fourteenth Article of Amendment to the Constitution of the United States and of Section 3 of said Act of March 2d, 1907, and the constitutional rights of Petitioner under said sections; Petitioner claims a right, privilege and immunity under these said sections, and all because the construction placed upon said Section of the Constitution and said Act by this Court was against the right, privilege and immunity claimed by this Petitioner under such constitution and statute, to-wit: the claim that Petitioner is a citizen of the United States;

That your Petitioner is an American woman, born at Redwood City in the State of California, and within the United States of America, and subject to the jurisdiction of the said United States, upon the 3rd day of December, in the year A. D. 1885, and ever since her said birth has resided continuously and still resides in the State of California and she has never resided without

23 the said State or without the said United States of America;

That upon the 14th day of August, A. D. 1909, your Petitioner was lawfully married in the State of California, to Gordon Mackenzie, who ever since the date of said marriage has been, and now is, the husband of your Petitioner and ever since the date of said marriage your Petitioner has been, and now is the wife of said Gordon Mackenzie;

That at the time of the said marriage, the said Gordon Mackenzie was, and ever since has been, and now is, a citizen and subject of the Kingdom of Great Britain, and is not now and never has been a citizen of the United States of America, but at the time of said marriage the said Gordon Mackenzie was residing in the State of California and in the United States of America, and ever since the date of said marriage your Petitioner and her said husband have

resided together in the State of California, and still continue so to reside, and intend to continue to reside therein;

That Section I of Article II of the Constitution of the State of California, as amended October 10th, 1911, confers the right of suffrage upon every native citizen of the United States;

That at all the times herein mentioned the above named respondents, John P. Hare, Thomas V. Cator, Charles L. Queen, William McDevitt and John Hermann were the only lawfully appointed, qualified and acting election commissioners of the City and County of San Francisco, in the State of California, with power and authority to register and cause to be registered as voters in said City and County, all persons entitled to be registered as qualified voters in said City and County;

That on or about the 22nd day of January, 1913, your  
24      Petitioner applied to the respondents at the City and County of San Francisco, State of California, at the office of said respondents, and the usual place for registration of voters in said City and County, to be registered as a voter of the State of California in said City and County, in the manner required by the laws of said State of California, and that at the time of said application your Petitioner was a person born as aforesaid, and of the age of more than twenty-one years, and had been a resident of the said State of California for more than one year next preceding said application and a resident of the said City and County of San Francisco for more than ninety days next preceding said application, and a resident of the precinct of said City and County in which she offered to be registered as such voter for more than thirty days next preceding said application, and was not an idiot, nor an insane person, nor a person convicted of an infamous crime or of the embezzlement or misappropriation of public money, and was a person able to read the Constitution in the English language, and to write her name;

That at the time your Petitioner applied to be registered as a voter as aforesaid, your Petitioner offered and was ready to lawfully and truly make oath to all the facts aforesaid in the manner required by law, but the said respondents as composing such Board of Election Commissioners, will knowing said facts to be true, and not denying the same on or about said 22nd day of January, 1913, and before the commencement of these proceedings, did wholly and absolutely refuse to register your said Petitioner as a voter of the State of California in said City and County, or permit your Petitioner to be registered as a voter of the State of California in said City and County, giving and assigning as the sole reason for such refusal that your Petitioner was an American woman married to a foreigner, and that she was therefore and thereby barred

25      from such right of registration by virtue of the provisions of an Act of Congress of the United States of America, entitled, "An Act in reference to the expatriation of citizens and their protection abroad," approved March 2d, 1907, and that she was not a native citizen of the United States, and all without right and in violation of the rights of Petitioner under Section I of the Four-

teenth Article of Amendment to the Constitution of the United States; that your Petitioner is informed and believes that the said Act of Congress by reason of the facts aforesaid, and because your Petitioner has never resided without the United States of America, has no application to your Petitioner, and your Petitioner is also informed and believes that said Act of Congress was never intended to apply to a native born citizen of the United States who never resided without the jurisdiction thereof; that the said Act in so far as its provisions may be construed to relate to women born in the United States and subject to the jurisdiction thereof, to-wit: the provisions of Section 3 of the said Act, are unconstitutional and void and upon such information and belief your Petitioner avers that the said Act of Congress as to Section 3 thereof is unconstitutional, null and void, as being contrary to Section I of the Fourteenth Article of Amendment to the Constitution of the United States;

That your Petitioner claims to be a native citizen of the United States under the provisions of Section I of the Fourteenth Article of Amendment to the Constitution of the United States, and under the provisions of Section 3 of the Act of Congress, approved March 2d, 1907, entitled, "An Act in reference to the expatriation of citizens and their protection abroad;"

That said claim made by your Petitioner was denied by the final judgment of this Court on the 5th day of August, 1913, 26 all as appears from the records of this Court;

That this Court in this case, on the said 5th day of August, 1913, made and entered its final judgment that your Petitioner was not a native citizen of the United States, thereby denying to your Petitioner a right which she claimed and exercised, and does now claim under the Constitution of the United States, and particularly Section 1 of the Fourteenth Article of Amendment thereto, and also under Section 3 of the Act of Congress of March 2d, 1907, entitled, "An Act in reference to the expatriation of citizens and their protection abroad," all of which fully appears from said record;

Wherefore your Petitioner prays for a Writ of Error to the Supreme Court of the United States and your Petitioner will ever pray, etc.

ETHEL C. MACKENZIE,  
*Petitioner.*

MILTON T. U'REN,  
*Attorney for Petitioner.*

Let the Writ issue as prayed for upon Petitioner filing a Bond in the sum of \$500.00 with sufficient surety with the Clerk of this Court.

Done and dated this 23rd day of January, 1914.

W. H. BEATTY,  
*Chief Justice Supreme Court  
State of California.*

27 [Endorsed:] Clerk's Office Copy. No. 6465. In the  
Supreme Court of the State of California. Ethel C. Macken-

entitled action in the full and just sum of Five hundred (\$500) Dollars, to be paid to the said Defendants and Respondents in error, their certain attorney, executors, administrator or assigns; to which payment, well and truly to be made, it binds itself, its successors and assigns, firmly by these presents. Sealed with its seal and dated this 28th day of January, in the year of our Lord One thousand nine hundred and fourteen;

Whereas, the above named Ethel C. Mackenzie, plaintiff and appellant in error, seeks to prosecute a Writ of Error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State  
43 of California;

Now therefore, the condition of the above obligation is such that if the said plaintiff and appellant in error shall prosecute said Writ of Error to effect and answer all damages and costs that may be awarded against her, if she fail to make her plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

UNITED STATES FIDELITY AND  
GUARANTY COMPANY,

By H. V. D. JOHNS,

By B. P. OAKFORD,

*Attorneys in Fact.*

Approved:

W. H. BEATTY,

*Chief Justice of the Supreme Court  
of the State of California.*

January 29, 1914.

[SEAL.]

44 [Endorsed:] S. F. 6465. In the Supreme Court of the United States. Ethel C. Mackenzie, plaintiff and appellant in error, vs. John P. Hare et al., defendants and respondents in error. Bond on writ of error. Copy. Filed Feb. 4, 1914. B. Grant Taylor, clerk, by ———, deputy. Milton T. U'Ren, attorney for plaintiff, 710-711 Mechanics' Institute Building, 57 Post Street, San Francisco.

45

Original.

In the Supreme Court of the United States.

ETHEL C. MACKENZIE, Plaintiff and Appellant in Error,  
vs.

JOHN P. HARE, THOMAS V. CATOR, CHARLES L. QUEEN, WILLIAM McDevitt, and John Hermann, as and Composing the Board of Election Commissioners of the City and County of San Francisco, Defendants and Respondents in Error.

*Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Chief Justice and Associate Justices of the Supreme Court of the State of California and the Supreme Court of the State of California, Greeting:

Because in the record and proceedings and also in the rendition of a final judgment, by and before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the above entitled suit, between Ethel C. Mackenzie, plaintiff and appellant in error, against John P. Hare, Thomas V. Cator, Charles L. Queen, William McDevitt and John Hermann, as and composing the Board of Election Commissioners of the City and County of San Francisco, defendants and respondents in error, wherein is drawn in question a title, right, privilege or immunity,

46 claimed by plaintiff and appellant in error under the Constitution of the United States and of a Statute of the United States, and especially the right, title, privilege and immunity claimed under Section I of the Fourth Article of Amendment to the Constitution of the United States, and also claimed under an Act of Congress of March 2d, 1907, entitled, "An Act in reference to the expatriation of citizens and their protection abroad," that she is a citizen of the United States, and the decision is against the said right, title, privilege and immunity especially set up and claimed by said plaintiff and appellant under said Constitution and Statute, a manifest error hath happened to the great damage of said Ethel C. Mackenzie, plaintiff and appellant in error, as appears by the record, proceedings and judgment herein.

We being willing that the error, if any hath been made, should be duly corrected and full and speedy justice done to the party aforesaid,

In that behalf command you, if final judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same at Washington, D. C. on the 26th day of March next, in the said Supreme Court of the United States, at a

session thereof, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court of the United States this 27th  
47 day of January in the year of our Lord one thousand nine hundred and fourteen.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,  
*Clerk of the District Court of the United States,  
Second Division, in and for the Northern  
District of California,*  
By ———, Deputy Clerk.

Allowed:

W. H. BEATTY,  
*Chief Justice Supreme Court  
of the State of California.*

48 [Endorsed:] S. F. 6465. In the Supreme Court of the United States. Ethel C. Mackenzie, plaintiff and appellant in error, vs. John P. Hare et al., defendants and respondents in error. Writ of error. Original. Filed Feb. 4, 1914. B. Grant Taylor, clerk, by Erb, deputy. Milton T. U'Ren, attorney for appellant, 710-711 Mechanics' Institute Building, 57 Post Street, San Francisco.

49 Original.

In the Supreme Court of the State of California.

ETHEL C. MACKENZIE, Plaintiff and Appellant in Error,  
vs.

JOHN P. HARE, THOMAS V. CATOR, CHARLES L. QUEEN, WILLIAM McDevitt, and John Hermann, as and Composing the Board of Election Commissioners of the City and County of San Francisco, Defendants and Respondents in Error.

*Citation.*

UNITED STATES OF AMERICA, ss:

To John P. Hare, Thomas V. Cator, Charles L. Queen, William McDevitt, and John Hermann, as and Composing the Board Election Commissioners of the City and County of San Francisco, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States at Washington, D. C. on the 26th day of March next, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of Cali-

fornia, wherein Ethel C. Mackenzie is plaintiff and appellant in error and you are defendants and appellees in error, to show cause, if any there be, why the judgment rendered against the said appellant in error, as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

50      Dated January 29, 1914.

W. H. BEATTY,  
*Chief Justice of the Supreme Court  
of the State of California.*

We, Thomas V. Cator and William McDevitt, attorneys of record for John P. Hare, Thomas V. Cator, Charles L. Queen, William McDevitt and John Hermann, appellees in error in the above entitled cause, hereby acknowledge due service of the above Citation, Petition for Writ of Error, Assignment of Error, Prayer, Bond and Writ of Error and enter appearance for said appellees in error, and each of them in the Supreme Court of the United States.

PERCY V. LONG,  
*City Attorney of the City and County of  
San Francisco, and State of California;*  
THOMAS V. CATOR,  
WM. McDEVITT,  
*Attorneys for Appellees in Error.*

Dated February 3, 1914.

51      I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed are true and correct copies of petition for writ of mandate, demurrer, writ of mandate and affidavit of service, opinion, denial of rehearing, petition for writ of error, specifications and assignment of error, prayer for reversal, bond; also original writ of error and citation, as shown by the records of my office.

Witness my hand and the Seal of the Court, this the 4th day of February, A. D. 1914.

[Seal Supreme Court of California.]

B. GRANT TAYLOR, *Clerk.*  
By I. ERB, *Deputy Clerk.*

San Francisco office.

52      [Endorsed:] S. F. 6465. In the Supreme Court of the State of California. Ethel C. Mackenzie, plaintiff and appellant in error, vs. John P. Hare et al. defendants and respondents in error. Citation. Original. Filed Feb. 4. 1914. B. Grant Taylor, clerk, by Erb, deputy. Milton T. U'Ren, attorney for plaintiff 710-711 Mechanics' Institute Building, 57 Post street, San Francisco.

Endorsed on cover: File No. 24,074. California Supreme Court. Term No. 376. Ethel C. Mackenzie, plaintiff in error, vs. John P. Hare, Thomas V. Cator, Charles L. Queen, William McDevitt and John Herman, as and composing the Board of Election Commissioners of the City and County of San Francisco. Filed February 27th, 1914. File No. 24,074.

zie, plaintiff and appellant in error, vs. John P. Hare, et al., defendants and respondents in error. Petition for writ of error. Copy. Filed Feb. 4, 1914. B. Grant Taylor, Clerk. By ———, Deputy. Milton T. U'ren, attorney for petitioner, 710-711 Mechanics' Institute Building, 57 Post Street, San Francisco.

28

Copy.

In the Supreme Court of the State of California.

No. 6465.

ETHEL C. MACKENZIE, Plaintiff and Appellant in Error,  
vs.

JOHN P. HARE, THOMAS V. CATOR, CHARLES L. QUEEN, WILLIAM McDevitt, and John Hermann, as and composing the Board of Election Commissioners of the City and County of San Francisco, Defendants and Respondents in Error.

*Specifications and Assignment of Error.*

I. Preface to Specifications of Error.

That heretofore and on the 3d day of February, 1913, Petitioner duly filed in this Court her verified petition for a Writ of Mandate against the above named defendants and respondents in error, in words and figures as follows, to-wit:

(Title of Court and Cause.)

Petition for Writ of Mandate.

To the Honorable the Justices of the Supreme Court of the State of California:

The petition of Ethel C. Mackenzie, the above named petitioner herein, respectfully alleges and shows unto this Honorable Court:

I.

29 That at all the times hereinafter mentioned, the above named respondents, John P. Hare, Thomas V. Cator, Charles L. Queen, William McDevitt and John Hermann, were the lawfully appointed and qualified election Commissioners of the City and County of San Francisco, in the State of California, and as such Board have exclusive power and authority to register and cause to be registered as voters in said City and County, all persons lawfully entitled to be registered as qualified voters in the said City and County;

II.

That your petitioner, Ethel C. Mackenzie, is an American woman, born at Redwood City, in the State of California, and within the

United States of America, and subject to the jurisdiction of the said United States of America, upon the third day of December, in the year A. D. 1885, and has ever since her said birth continuously resided and still resides in the State of California aforesaid, and she has never resided without said State, or without the said United States of America;

### III.

That upon the 14th day of August, A. D. 1909, your petitioner was lawfully married in the State of California aforesaid, to Gordon Mackenzie, who ever since the date of said marriage has been, and still is, the husband of your said petitioner and ever since the date of said marriage your petitioner has been, and still is, the wife of said Gordon Mackenzie;

### IV.

That at the time of said marriage the said Gordon Mackenzie was, and ever since has been, and now is a citizen and subject of the Kingdom of Great Britain, and is not now and never has been a citizen of the United States of America, but that at the time of said marriage the said Gordon Mackenzie was residing in the  
30 State of California, in the United States of America, and ever since the date of said marriage your said petitioner, as his said wife, has resided with him in the said State of California and still continues so to reside; and intends to continue to reside therein;

### V.

That on or about the 22d day of January, 1913, your petitioner applied to the respondents at the City and County of San Francisco, at the office of said respondents and the usual place for the registration of voters, in said City and County, to be registered as a voter in said City and County, in the manner required by the law of the said State of California, and that at the time of said application your petitioner was a person born as aforesaid, and of the age of more than twenty-one years, and has been a resident of the said state of California, for more than one year next preceding said application and a resident of the City and County of San Francisco, for more than ninety days next preceding said application, and a resident of the precinct in said City and County in which she offered to be registered as such voter for more than thirty days next preceding said application, and was not an idiot, nor an insane person, nor a person convicted of any infamous crime, or of the embezzlement or misappropriation of public money, and was a person able to read the Constitution in the English language, and to write her name;

### VI.

That at the time of said application to be so registered as a voter, as aforesaid, your petitioner offered and was ready and willing to lawfully and truly make oath to all the facts aforesaid in the man-

ner required by law, but the said respondents, as composing such Board of Election Commissioners, well knowing said facts  
31 to be true and not denying the same on or about said 22d day of January, 1913, and before the commencement of this proceeding, did wholly and absolutely refuse to register your said petitioner as a voter in said City and County, or to permit your petitioner to be registered as a voter in said City and County, giving and assigning as the sole reason for such refusal that your petitioner was an American woman married to a foreigner, and that she was therefore and thereby barred from such right of registration by virtue of the provisions of an Act of Congress of the United States of America, entitled, "An Act in Reference to the Expatriation of Citizens and Their Protection Abroad," Approved March 2d, 1907; that your petitioner is informed and believes that the said Act of Congress, by reason of the facts aforesaid, and because your petitioner has never resided without the United States of America, has no application to your petitioner, and your petitioner is also informed and believes that if said Act of Congress applied to your petitioner, that the said Act in so far as its provisions relate to women born in the United States and subject to the jurisdiction thereof, to-wit: the provisions of Section 3 of the said Act, are unconstitutional and void and upon such information and belief your petitioner avers that the said Act of Congress as to Section 3 thereof is unconstitutional, null and void, as being contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States;

#### VII.

That your petitioner is the party beneficially interested in this proceeding and that she has no plain, speedy or adequate remedy at law and can only obtain such registration as a voter by virtue of the writ of mandate of this Honorable Court;

32

#### VIII.

That initiative proceedings have been taken in said City and County whereby an election will be held therein in the near future, and other elections will be held therein within a time within which your petitioner will only be able to participate as a voter by the early issuance of the writ of mandate of this Honorable Court commanding the respondents to register your petitioner as a qualified voter in said City and County, and the reason this application for a writ of mandate is made to this Court, and not the Superior Court, or the District Court of Appeals is, because, this Honorable Court is the only tribunal which can hear and finally determine this application within the time necessary to protect the rights of suffrage of your petitioner;

Wherefore, your petitioner demands the judgment or order of this Court, that an alternative writ of mandamus issue out of and under the seal of this Honorable Court, commanding the respondents, as such Board of Election Commissioners, immediately after the receipt

thereof, to register your petitioner as a qualified voter in the said City and County of San Francisco, in the appropriate precinct therein, or show cause before this Honorable Court in bank at a time and place to be named in such writ, why they, the said respondents, have not done so, and why said alternate writ of mandamus should not be made permanent, and that petitioner have such further order, judgment or relief as the nature of the case may require with costs.

MILTON T. U'REN,  
*Attorney for Petitioner.*

Dated, San Francisco, February 3d, 1913.

33 STATE OF CALIFORNIA,  
*City and County of San Francisco, ss:*

Ethel C. Mackenzie, being duly sworn, deposes and says:

That she is the petitioner named in the foregoing petition, and that she has read the foregoing petition and knows the contents thereof, and that the same is true of her own knowledge, except as to those matters therein stated, upon her information and belief, and that as to those matters she believes it to be true;

ETHEL C. MACKENZIE.

Subscribed and sworn to before me this 3d day of February, 1913.

[SEAL.]

ROBERT R. RUSS,

*Notary Public in and for the City and County  
of San Francisco, State of California.*

That thereafter and on the 4th day of February, 1913, this Court issued a Writ of Mandate, directed to the above named respondents, in the words and figures as follows: to-wit:

(Title of Court and Cause.)

*Alternative Writ of Mandate.*

To the above named respondents, John P. Hare, Thomas V. Cator, Charles L. Queen, William McDevitt and John Hermann, as composing the Board of Election Commissioners of the City and County of San Francisco, Greeting:

Whereas, it manifestly appears unto this Court by the petition of Ethel C. Mackenzie, heretofore duly filed in this proceeding,  
34 that the said Respondents constitute the Board of Election Commissioners of the City and County of San Francisco, and that as such Board the respondents have refused to register the said petitioner as a qualified voter in the City and County of San Francisco, in the appropriate precinct thereof, after lawful application by the said petitioner to be so registered;

Now, this is to command you, the said respondents, as said Board, that immediately after the receipt of this Writ, you cause the said petitioner upon her proper application in person to be registered as

a qualified voter in the said City and County of San Francisco, in the appropriate precinct thereof, in the manner required by law, or that you show cause before our Supreme Court in bank, at the rooms of said Supreme Court, in the Wells-Fargo Building, at the corner of Second and Mission Streets, in said City and County, upon the 3d day of March, 1913, at 10:00 o'clock A. M. of such day, or as soon thereafter as counsel can be heard, why you have not done so, and why this alternative writ should not upon such hearing be made permanent, and why the petitioner should not have such other or further order, judgment or relief, as the nature of the case may require, with costs.

Witness the hand of Honorable William H. Beatty, Chief Justice of our said Supreme Court of the State of California, and the seal of said Court this 4th day of February, 1913.

[SEAL.]

B. GRANT TAYLOR,  
*Clerk of the Supreme Court*  
*of the State of California.*  
By I. ERB, *Deputy Clerk.*

That thereafter and upon the 3d day of March, 1913, the said cause regularly came on for hearing before this Court and  
35 upon such hearing the said respondents appeared and filed their Demurrer to said petition in words and figures as follows, to-wit:

(Title of Court and Cause.)

*Demurrer.*

Now come the Respondents in the above entitled proceeding and demur unto the petition of the Petitioner in this proceeding, and for cause of demurrer alleges and state:

That the said petition does not state facts sufficient to constitute a cause of action against the respondents or to entitle the petitioner to any relief.

Wherefore, the respondents demand that the said petition be dismissed and that the respondents may have any other order which the nature of the case may require.

THOMAS V. CATOR,  
WM. McDEVITT,  
*Attorneys for Respondents.*

That said cause was thereupon argued by respective counsel for said plaintiff and defendants and was thereupon submitted to said Court for its decision upon briefs to be filed by the respective parties;

That thereafter and on the 5th day of August, 1913, this Court made and entered its order, judgment and decision in said cause, denying the writ applied for, which decision is now on filed in this Court.

## II. Assignment of Error.

On the 3d day of December, 1885, your petitioner, an  
36 American woman, was born at Redwood City in the State of California, and ever since her birth has resided continuously and still resides in the State of California, and has never resided without the said State or without the United States of America;

On the 15th day of August, 1909, your petitioner was lawfully married in the State of California to Gordon Mackenzie, who ever since the date of said marriage has been, and still is, the husband of your petitioner and ever since the date of said marriage, your petitioner has been, and now is, the wife of said Gordon Mackenzie;

At the time of said marriage said Gordon Mackenzie was, and ever since has been, and now is, a citizen and subject of the Kingdom of Great Britain, and is not now and never has been a citizen of the United States of America, but at the time of said marriage, the said Gordon Mackenzie was residing in the State of California, in the United States of America, and ever since the date of said marriage your said petitioner as his said wife, has resided with him in the State of California, and still continues so to reside and intends to continue to reside therein;

At all the times herein mentioned the above named respondents were the lawfully appointed and qualified election commissioners of the City and County of San Francisco, State of California, and as such have exclusive power and authority to register and cause to be registered as voters in said City and County, all persons lawfully entitled to be registered as qualified voters in the said City and County;

On the 22d day of January, 1913, petitioner applied to respondents, at the City and County of San Francisco, at the office of said respondents, and the usual place for registration of voters,  
37 to be registered as a voter in said City and County in the manner required by law and at the time of said application, petitioner was a person born as aforesaid and qualified to be registered in all other particulars as required by law, and was ready and willing to lawfully and truly make oath to all the facts aforesaid in the manner required by law, and offered so to do, but the said respondents, well knowing said facts to be true and not denying the same on or about the said 22d day of January, 1913, did wholly and absolutely refuse to register petitioner as a voter in said City and County or to permit your petitioner to be registered in said City and County, giving and assigning as the sole reason for such refusal that your petitioner was an American woman married to a foreigner, and that she had thereby ceased to be a citizen of the United States, under and by virtue of the provisions of an Act of Congress entitled, "An Act in reference to the expatriation of citizens and their protection abroad," approved March 2d, 1907;

Petitioner is a citizen of the United States under and by virtue of the Constitution of the United States, and particularly of Section I of the Fourteenth Article of Amendment thereto, and as such is entitled to all the rights, privileges and immunities guaranteed to

citizens of the United States under the Constitution of the United States;

(a) This Court erred in holding that your petitioner is not a citizen of the United States under the provisions of the Constitution of the United States and particularly of Section I of the Fourteenth Article of Amendment thereto;

(b) This Court erred in holding that the provisions of Section 3 of an Act of Congress, entitled, "An Act in reference to the expatriation of citizens and their protection abroad," approved

38 March 2d, 1907, were constitutional and not contrary to provisions of Section I of the Fourteenth Article of Amendment to the Constitution of the United States in so far as Section 3 of said Act applies to your petitioner, who is a woman born in the United States and subject to the jurisdiction thereof;

(c) This Court erred in holding that petitioner was not a citizen of the United States under the provisions of Subdivision 3 of said Act;

(d) This Court erred in holding that said Act had any application to your petitioner in view of the fact that your petitioner has never resided without the State of California, or the United States of America;

(e) This Court erred in holding that said Act applied to your petitioner, who is a woman born in the United States and subject to the jurisdiction thereof;

(f) That by its decision and the construction placed on said Act of March 2d, 1907, entitled, "An Act in reference to the expatriation of citizens and their protection abroad," this Court deprived and took from petitioner a right, privilege and immunity especially set up and claimed by her under the Constitution of the United States and especially under Section I of the Fourteenth Article of Amendment to the Constitution of the United States, and also a right, privilege and immunity especially set up and claimed by petitioner under a statute of the United States, and especially Section 3 of the Act of March 2d, 1907, entitled, "An Act in reference to the expatriation of citizens and their protection abroad."

MILTON T. U'REN,

*Attorney for Petitioner.*

39 [Endorsed:] No. 6465. In the Supreme Court of the State of California. Ethel C. Mackenzie, Plaintiff and Appellant in Error, vs. John P. Hare et al., Defendants and Respondents in Error. Specifications and assignment of Error. Copy. Filed Feb. 4, 1914. B. Grant Taylor, Clerk, by —, Deputy. Milton T. U'Ren, Attorney for Petitioner, 710-711 Mechanics' Institute Building, 57 Post Street, San Francisco.

Copy.

In the Supreme Court of the United States.

ETHEL C. MACKENZIE, Plaintiff and Appellant in Error,  
 vs.  
 JOHN P. HARE, THOMAS V. CATOR, CHARLES L. QUEEN, WILLIAM  
 McDevitt, and John Hermann, as and Composing the Board of  
 Election Commissioners of the City and County of San Francisco,  
 Defendants and Respondents in Error.

*Prayer for Reversal.*

To the Honorable the Supreme Court of the United States:

Now comes Ethel C. Mackenzie, the plaintiff in error above named and prays for a reversal of the judgment of the Supreme Court of the State of California in the action brought by plaintiff against defendants, which said judgment was made and entered by said Supreme Court on the 5th day of August, 1913.

MILTON T. U'REN,  
*Attorney for Petitioner.*

41 [Endorsed:] S. F. 6465. In the Supreme Court of the United States. Ethel C. Mackenzie, Plaintiff and Appellant in Error, vs. John P. Hare et al., Defendants and Respondents in Error. Prayer for reversal. Copy. Filed Feb. 4, 1914. B. Grant Taylor, Clerk, by —, Deputy. Milton T. U'Ren, Attorney for Plaintiff, 710-711 Mechanics' Institute Building, 57 Post Street, San Francisco.

Copy.

United States Fidelity and Guaranty Company.

Capital Paid in Cash \$2,000,000. Total Resources Over \$6,000,000.

Home Office, Baltimore, Md.

In the Supreme Court of the United States.

ETHEL C. MACKENZIE, Plaintiff and Appellant in Error,  
 vs.  
 JOHN P. HARE, THOMAS V. CATOR, CHARLES L. QUEEN, WILLIAM  
 McDevitt, and John Hermann, as and Composing the Board of  
 Election Commissioners of the City and County of San Francisco,  
 Defendants and Respondents in Error.

Know all men by these Presents: That the United States Fidelity & Guaranty Company, of Baltimore, Maryland, is held and firmly bound unto the Defendants and Respondents in error in the above

(24,074)

FILED

APR 5 1915

# In the Supreme Court

JAMES D. MAHER  
CLERK

## OF THE United States

OCTOBER TERM, 1914

No. 376

79

ETHEL C. MACKENZIE,

*Plaintiff in Error,*

VS.

JOHN P. HARE, THOMAS V. CATOR, CHARLES  
L. QUEEN, WILLIAM McDEVITT, and JOHN  
HERMAN, as and composing the Board  
of Election Commissioners of the City  
and County of San Francisco,

*Defendants in Error.*

### BRIEF FOR PLAINTIFF IN ERROR.

MILTON T. U'REN,

*Attorney for Plaintiff in Error.*

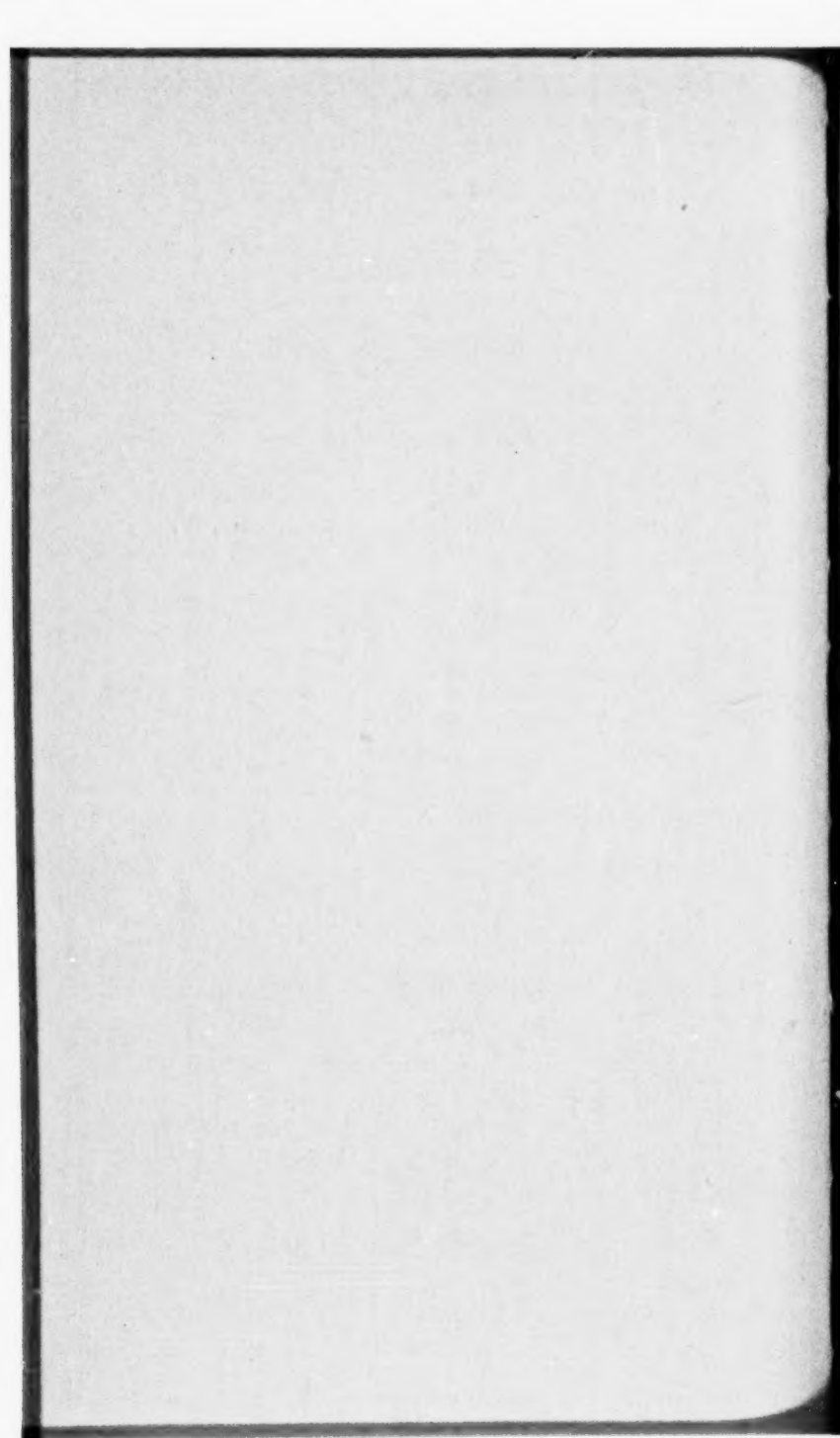
U'REN & BEARD,

*Of Counsel.*

Filed this \_\_\_\_\_ day of March, 1915.

JAMES D. MAHER, Clerk.

By \_\_\_\_\_ Deputy Clerk.



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(24,074)

**In the Supreme Court**  
OF THE  
**United States**

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OCTOBER TERM, 1914

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No. 376

ETHEL C. MACKENZIE,

*Plaintiff in Error,*

VS.

JOHN P. HARE, THOMAS V. CATOR, CHARLES  
L. QUEEN, WILLIAM MCDEVITT, and JOHN  
HERMAN, as and composing the Board  
of Election Commissioners of the City  
and County of San Francisco,

*Defendants in Error.*

---

**BRIEF FOR PLAINTIFF IN ERROR.**

---

**I. Introduction.**

The question at issue in this case is the citizenship of the plaintiff in error; the decision of this Court will determine whether she is a citizen of the United States or of the Kingdom of Great

Britain. The right of citizenship of the United States is now one of the greatest importance. Time was, but a short while ago, when the lines of nationality were loosely drawn; the world was apparently entering upon an era of peace and goodwill, and men were paying less and less heed to national citizenship. At the present time all this is changed. Now no merely theoretical or debatable advantages mark the difference between citizenship in America and in England. The citizenship of this plaintiff is an asset that is now tangibly worth her life and her liberty, and the difference between citizenship in the United States and in England can be measured in concrete terms of life and limb and in security of her property. The world's great conflict makes the question of plaintiff's citizenship of the utmost importance to her. The decree of this Court will determine not merely whether she is a citizen of the United States or of England, but will decide also whether she is a citizen of a neutral country or an enemy of the three great world powers of Germany, Austria-Hungary and Turkey, and as such, subject to detention, capture and death at the hands of these powers. It is with a realization of the importance of the question at issue that the plaintiff in error comes before this Court with the prayer that the judgment of the Supreme Court of California be reversed and that she be adjudged a citizen of the United States.

## II. Statement of Facts.

This case is brought before this Court by writ of error to the Supreme Court of the State of California to review a judgment of said Court in favor of defendants. The judgment of the California Court was made upon the ground that the plaintiff in error is not a citizen of the United States.

The plaintiff, claiming to be a citizen of the United States, duly and regularly applied to defendants for registration as a voter under the laws and Constitution of the State of California. The defendants refused to register her as a voter or to permit her to be registered, giving and assigning as the sole reason for such refusal, the claim that plaintiff is not a native citizen of the United States, but is a citizen and subject of the Kingdom of Great Britain.

The plaintiff thereupon sued out a writ of mandamus in the Supreme Court of California to compel defendants to register her as a voter as a native citizen of the United States. Said Court issued an alternative writ of mandamus directing defendants to either register plaintiff as a voter or to appear before the Court on a day specified and show cause why they had not done so. Thereafter, upon the return day, defendants appeared and showed cause, by filing a demurrer to the petition, why they had refused to register plaintiff. By filing a demurrer, the defendants admitted all of the allegations of fact set up in the petition and raised the single question of law whether under such

admitted facts, plaintiff is a native citizen of the United States and entitled to register as such.

The allegations of fact set up in the petition regarding the citizenship of plaintiff and the reason why defendants have refused to register her, are as follows:

“II.

That your petitioner, Ethel C. Mackenzie, is an American woman, born at Redwood City, in the State of California, and within the United States of America, and subject to the jurisdiction of the said United States of America, upon the third day of December, in the year A. D. 1885, and has ever since her said birth continuously resided and still resides in the State of California aforesaid, and she has never resided without said State, or without the said United States of America.

III.

That upon the 14th day of August, A. D. 1909, your petitioner was lawfully married in the State of California aforesaid, to Gordon Mackenzie, who ever since the date of said marriage has been, and still is, the husband of your said petitioner and ever since the date of said marriage your petitioner has been, and still is, the wife of said Gordon Mackenzie.

IV.

That at the time of said marriage the said Gordon Mackenzie was, and ever since has been, and now is a citizen and subject of the Kingdom of Great Britain, and is not now and never has been a citizen of the United States of America, but that at the time of said marriage the said Gordon Mackenzie was residing in the State of California, in the United States of America, and ever since the date of said marriage your said petitioner, as his said wife, has

resided with him in the said State of California and still continues so to reside; and intends to continue to reside therein.

V.

That on or about the 22d day of January, 1913, your petitioner applied to the respondents at the City and County of San Francisco, at the office of said respondents and the usual place for the registration of voters, in said City and County, to be registered as a voter in said City and County, in the manner required by the law of the said State of California, and that at the time of said application your petitioner was a person born as aforesaid, and of the age of more than twenty-one years, and has been a resident of the said State of California, for more than one year next preceding said application and a resident of the said City and County of San Francisco, for more than ninety days next preceding said application, and a resident of the precinct in said City and County in which she offered to be registered as such voter for more than thirty days next preceding said application, and was not an idiot, nor an insane person, nor a person convicted of any infamous crime, or of the embezzlement or misappropriation of public money, and was a person able to read the Constitution in the English language, and to write her name.

VI.

That at the time of said application to be so registered as a voter, as aforesaid, your petitioner offered and was ready and willing to lawfully and truly make oath to all the facts aforesaid in the manner required by law, but the said respondents, as composing such Board of Election Commissioners, well knowing said facts to be true and not denying the same on or about said 22d day of January, 1913, and before the commencement of this proceeding, did wholly and absolutely refuse to register

your said petitioner as a voter in said City and County, or to permit your petitioner to be registered as a voter in said City and County, giving and assigning as the sole reason for such refusal that your petitioner was an American woman married to a foreigner, and that she was therefore and thereby barred from such right of registration by virtue of the provisions of an Act of Congress of the United States of America, entitled, "An Act in Reference to the Expatriation of Citizens and their Protection Abroad", approved March 2d, 1907; that your petitioner is informed and believes that the said Act of Congress, by reason of the facts aforesaid, and because your petitioner has never resided without the United States of America, has no application to your petitioner, and your petitioner is also informed and believes that if said Act of Congress applied to your petitioner, that the said Act in so far as its provisions relate to women born in the United States and subject to the jurisdiction thereof, to wit: the provisions of Section 3 of said Act, are unconstitutional and void and upon such information and belief your petitioner avers that the said Act of Congress as to Section 3 thereof is unconstitutional, null and void, as being contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States" (Trans. of Rec., pp. 1, 2 and 3).

It will, therefore, be seen that the refusal of defendants to register plaintiff is based upon the contention that she became a citizen of Great Britain, upon her marriage to Gordon Mackenzie, under the provisions of Section 3 of an Act of Congress of the United States, entitled, "An Act in reference to the expatriation of citizens and their protection

abroad", approved March 2, 1907. Said section reads as follows:

"That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

34 Stats. L., 1228.

The soundness of this objection is the question to be decided. If it be true that plaintiff, by reason of her marriage to Gordon Mackenzie, under the conditions set forth in her petition, has become a citizen and subject of Great Britain, and has forfeited her American citizenship, she is not entitled to registration under the Constitution and laws of the State of California.

**1. PLAINTIFF'S RIGHT TO REGISTRATION AND TO VOTE  
DEPENDS UPON HER AMERICAN CITIZENSHIP.**

The provisions of the Constitution of the State of California, relating to the right of suffrage, are as follows:

"Every native citizen of the United States, every person who shall have acquired the rights of citizenship under or by virtue of the treaty of Queretaro, and every naturalized citizen thereof, who shall have become such ninety days prior to any election, of the age of twenty-one years who shall have been resident of the State one year next preceding the election, and

of the county in which he or she claims his or her vote ninety days, and in the election precinct thirty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law; provided, no native of China, no idiot, no insane person, no person convicted of any infamous crime, no person hereafter convicted of the embezzlement or misappropriation of public money, and no person who shall not be able to read the Constitution in the English language and write his or her name, shall ever exercise the privileges of an elector in this State; provided, that the provisions of this amendment relative to an educational qualification shall not apply to any person prevented by physical disability from complying with its requisitions, nor to any person who now has the right to vote, nor to any person who shall be sixty years of age and upwards at the time this amendment shall take effect."

Sec. 1, Art. 2, Const. of the State of Cal.

The section of the Constitution of the State of California above quoted is as it was amended by the people of the State on October 10, 1910. The change made by the amendment was the elimination of the word "male", and the purpose was to grant women equal suffrage with men. The right of plaintiff to register and to vote claimed upon these proceedings depends entirely upon whether she comes within the provisions of the portion of the section extending suffrage to "every native citizen", and whether she is in fact a "native citizen of the United States".

In the Court below, the defendants contended that plaintiff's remedy is one which she may gain from

the State and that the right to vote may be extended to her by amending the Constitution of the State of California so as to permit native-born women marrying foreigners to vote. If defendants' contention that plaintiff has become a citizen of Great Britain, and has ceased to be a citizen of the United States, is correct, the only right of suffrage which the State may extend to her is the right to vote as an *alien*. This plaintiff does not desire. She claims to be and is a native citizen of the United States, and entitled to vote under the provisions of the Constitution and the laws of the State of California as they now exist. She comes demanding registration and the right to vote as a native citizen of the United States.

## 2. THE QUESTION BEFORE THE COURT.

The sole question, therefore, to be determined is, does plaintiff come within the first provision of Section 1, Article II, of the Constitution of the State of California? Is she a *native citizen* of the United States?

Plaintiff, having been born in the United States and subject to the jurisdiction thereof, was by birth a citizen of the United States, and having continued to reside within the United States from the time of her birth to the date of her marriage to Gordon Mackenzie August 14, 1909, was at the time of her marriage an American citizen. Did she lose that citizenship by reason of her said marriage? The pleadings show and admit that ever since her birth and at the time of her said marriage,

and ever since, she has remained within the United States and subject to the jurisdiction thereof, and that she has no intention of leaving the United States; that she has not renounced her allegiance to the United States, and has no intention of so doing; that she has performed no act, expressive of her election to renounce her citizenship; that the only act on her part upon which can be based the contention that she has renounced her allegiance to the United States is the mere marriage itself; that she desires to remain an American citizen and has no wish to renounce her citizenship; that if she is divested of her American citizenship, it will be without her consent and contrary to her express will and desire.

Defendants, admitting all this to be true, contend that the mere marriage of plaintiff to Gordon Mackenzie on March 14, 1909, worked a forfeiture of her citizenship and made her a citizen of the Kingdom of Great Britain. They moreover contend that her desire and will does not enter into the consideration of the question at all; that notwithstanding her express desire not to renounce her American citizenship, her marriage *ipso facto* deprived her of it.

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### III. Specifications of Error Relied Upon.

Plaintiff, in the proceedings before the Supreme Court of California, claimed to be a citizen of the United States under and by virtue of the Constitution of the United States and particularly of Sec-

tion 1 of the Fourteenth Article of Amendment thereto, and as such citizen entitled to all the rights, privileges and immunities guaranteed to citizens of the United States. The Supreme Court of the State of California, by its final decision, denied that plaintiff is a citizen of the United States, and thereby erred in the following respects and particulars:

1. (a) Said Court erred in holding that plaintiff is not a citizen of the United States under the provisions of the Constitution of the United States, and particularly of Section 1 of the Fourteenth Article of Amendment thereto.

(b) Said Court erred in holding that the provisions of Section 3 of an Act of Congress, entitled, "An Act in reference to the expatriation of citizens and their protection abroad", approved March 2, 1907, were constitutional and not contrary to the provisions of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States in as far as Section 3 of said Act applies to plaintiff, who is a woman born in the United States and subject to the jurisdiction thereof.

(c) Said Court erred in holding that plaintiff is not a citizen of the United States under the provisions of Section 3 of said Act.

(d) Said Court erred in holding that said Act had any application to plaintiff in view of the fact that she has never resided without the State of California or the United States of America.

(e) Said Court erred in holding that said Act applied to plaintiff, who is a woman born within

the United States and subject to the jurisdiction thereof.

(f) That by its decision and the construction placed on said Act of March 2, 1907, entitled, "An Act in reference to the expatriation of citizens and their protection abroad", said Court deprived and took from plaintiff a right, privilege and immunity especially set up and claimed by her under the Constitution of the United States, and especially under Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, and also a right, privilege and immunity especially set up and claimed by plaintiff under a statute of the United States, and especially under Section 3 of the Act of March 2, 1907, entitled, "An Act in reference to the expatriation of citizens and their protection abroad."

## **2 (a) REVIEW OF CALIFORNIA SUPREME COURT DECISION.**

The California Court, in rendering its decision, did not seem to grasp the contention set up by plaintiff. The Court, in discussing the case of *United States v. Wong Kim Ark* (169 U. S. 649), and after quoting from said decision (pg. 703), as follows:

"The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away", then stated, "from this remark it is argued that a native-born citizen cannot, since the adoption of that amendment, renounce his citizenship" (Trans. of Rec. p. 12).

Plaintiff set up no such contention in the California Court, nor does she now. Plaintiff, of course, recognizes that a citizen may renounce his citizenship, but insists that such renunciation must be voluntary and done for that purpose; that Congress has no power to deprive a person of her citizenship without her consent and for no sufficient or reasonable cause; that marriage to a resident alien does not constitute expatriation and that Congress has no power to declare such an act an act of expatriation.

The California Court also erred by assuming facts in issue contrary to those admitted by the pleadings. One of the main arguments controlling the Court in rendering its decision was as follows:

“When an alien and a citizen intermarry, they not infrequently return to reside, either temporarily or permanently, to the country of the alien spouse, thereby giving rise to questions concerning their rights as citizens or aliens of the respective countries, from which there have ensued international disputes to be discussed and settled by diplomatic correspondence between the United States and the foreign country” (Trans. of Rec. p. 10).

The admitted facts in this case are that neither the plaintiff nor her husband has, since the marriage, left the United States, nor has the plaintiff in any way manifested an intention of leaving the United States; that on the contrary, it is her intention to remain permanently within the United States. The case was brought before the Supreme Court of California, for the purpose of determining

whether a woman, upon these admitted facts, could be made a citizen of another country and could be expatriated by Congress as long as she continued to reside in the United States. The California Court, ignoring the admitted facts, rendered an opinion that she had become expatriated because she *might* some time leave the United States, and consequently there *might* arise some international disputes.

The Court, in its opinion, did not consider or discuss the real question in controversy, to wit: the power of Congress to enact the legislation under which it is claimed plaintiff has become expatriated. Plaintiff's case rests upon the contention that such legislation, if intended to apply to her, is beyond the authority of Congress. The California Court assumed that Congress has the power to enact the legislation in question and thereby assumed the very question in issue.

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#### IV. Argument.

Plaintiff contends that said Act of March 2, 1907, has no application to her, and that she has not lost her citizenship thereby, because (1) that it was never the intention of Congress to deprive an American-born woman, remaining within the jurisdiction of the United States, of her citizenship by reason of her marriage to a resident foreigner; (2) that if such was the intention of Congress, such Act is void and unconstitutional as contrary to the pro-

visions of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States and beyond the scope of the power conferred upon Congress by the Constitution.

**1. IT WAS NEVER THE INTENTION OF CONGRESS TO DEPRIVE AN AMERICAN BORN WOMAN REMAINING WITHIN THE JURISDICTION OF THE UNITED STATES OF HER CITIZENSHIP BY REASON OF HER MARRIAGE TO A RESIDENT FOREIGNER.**

The history of the Act of March 2, 1907, shows that it was never the intention of Congress, when enacting the law, to confer English or other foreign citizenship, upon, or to take from, an American-born woman, *remaining within the jurisdiction of the United States*, her American citizenship, by reason of her marriage to a resident foreigner. The report of the Committee, upon which the legislation was enacted, shows that the intent of Congress was solely to legislate concerning the status of citizens *abroad* and the question arising by reason thereof. The subject was considered by the Foreign Affairs Committee of the House of Representatives, and that fact of itself shows that the legislation was considered as one affecting the rights of citizens abroad.

The whole purpose and general scope of the Act is one concerning the rights of American citizens residing abroad who have placed themselves without the jurisdiction of the United States. It may be necessary and quite proper that legislation as to the citizenship of such citizens should exist, as the State

Department of the Federal Government may be called upon to extend the protection of our Government to persons abroad claiming citizenship of the United States. Before the passage of this Act, there were many conflicting decisions regarding the status of American-born women who had married non-resident foreigners and who themselves had left the jurisdiction of the United States. Many of these women, notwithstanding the fact that they had departed from the United States, still claimed the protection of their mother country. The purpose of the Act was to settle the law concerning those citizens of the United States who had gone to foreign countries, and who were demanding the protection of the United States Government. No necessity existed for legislation concerning native citizens continuing to reside within the jurisdiction of the United States, whether they be male or female. The State Department, in dealing with the question of citizenship, is necessarily called upon only to construe the rights of American citizens abroad and the status of American women married to foreigners who reside abroad. No reason exists why the State Department should concern itself about American women married to foreigners, but who continue to reside within the jurisdiction of the United States. A construction of Section 3, which would deprive an American woman continuing to reside within the United States and subject to the jurisdiction thereof, of her citizenship, is not necessary to the intent and purpose of the Act, inasmuch as it is plainly seen that the object of Congress was to

deal with the various questions which arose concerning the rights of American citizens abroad.

The provisions of the Act of March 2, 1907, are highly penal, and therefore should be strictly construed.

In re Wildberger, 214 Fed. 508.

American citizenship has always been a priceless possession. It ought never to be taken from any one by implication or construction. On the contrary, all doubt ought to be resolved against such a construction of the Act as would operate to deprive a citizen of such a right. The leaning in cases of citizenship should always be in favor of the claimant of it.

David Levy, 1 Bart. El. Cas. 41.

The Act of March 2, 1907, was the result of certain recommendations by the Foreign Affairs Committee to the House of Representatives. The legislation deemed necessary is specified in the report of this Committee to the House of Representatives, pursuant to which the Committee, upon whose report the Act of March 2, 1907, was enacted, was appointed, and is as follows:

"It is the opinion of the Committee that legislation is required to settle some of the embarrassing questions that arise in reference to the *citizenship, expatriation, and the protection of American citizens abroad.* (Italics ours.)

Report No. 4784, 59th Cong., 1st Sess., contained in House Doc. 326, 59th Cong., 2d Sess., at p. 1.

Here we have a statement of the legislation deemed necessary by the House Committee on Foreign Affairs. The language admits of no other construction than that the legislation was to affect only citizens *abroad*. Three subjects are mentioned, to wit: citizenship, expatriation and protection, and if we are to give the sentence grammatical construction, each of these is qualified by the phrase "of American citizens abroad". It is conceded that the phrase "of American citizens abroad" qualifies the word "protection", the last subject named. Furthermore, it is apparent that it was never intended to legislate generally upon "citizenship". No "embarrassing question" can arise in reference to the citizenship of American citizens remaining within the United States, and therefore it is certain that the phrase "of American citizens abroad" also qualifies "citizenship". It follows that if the phrase "of American citizens abroad" qualifies the word "citizenship", the first subject mentioned, it must also qualify the word "expatriation", the second subject mentioned. There can be no other construction given this sentence without violating the most elementary rules of grammatical construction, than to read the sentence as follows:

"It is the opinion of the Committee that legislation is required to settle some of the embarrassing questions that arise in reference to the citizenship of American citizens abroad, the expatriation of American citizens abroad and the protection of American citizens abroad",

supplying the phrase "of American citizens abroad" in the places of the commas. Counsel will no doubt contend that the word "abroad" should not be held to qualify "expatriation", and will argue that there can be no such thing as expatriation of American citizens abroad. In this he is clearly in error, for, as we will show (post), no citizen may *expatriate* himself except by going abroad. It was clearly the purpose of Congress in enacting this legislation to provide a rule for determining under what circumstances a citizen *abroad* might be considered expatriated.

We believe that the foregoing discussion has shown that it was never the intention of Congress to deprive any native-born American woman, marrying a foreigner but continuing to reside in the United States and remaining subject to the jurisdiction thereof, of her citizenship by the Act of March 2, 1907. We, however, further submit that if the Act of Congress was intended to apply to citizens of the United States remaining within the jurisdiction thereof, it is null and void as being in contravention to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

**2. IF THE ACT OF MARCH 2, 1907, APPLIES TO CITIZENS REMAINING WITHIN THE JURISDICTION OF THE UNITED STATES, IT IS NULL AND VOID.**

It here becomes necessary to consider preliminarily a few fundamental propositions in respect to citizenship, its nature, how it is gained and lost.

A. PLAINTIFF A CITIZEN OF THE UNITED STATES  
BY BIRTH.

It will not be denied by the defendants that plaintiff, having been born within the United States, and subject to the jurisdiction thereof, became a citizen by the fact of her birth.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

Sec. 1, 14th Amdt. U. S. Const.

See, also,

7 Cyc. 137;

Inglis v. Sailors' Snug Harbor, 3 Pet. (U. S.)  
99;

U. S. v. Wong Kim Ark, 169 U. S. 649.

B. SEX IS NOT INVOLVED IN QUESTION OF  
CITIZENSHIP.

The sex of the plaintiff and the fact that she is a woman does not exclude her from the protection of the Fourteenth Article of Amendment, and does not exclude her from any of the rights, privileges and immunities of her citizenship. She is in all respects just as much a citizen as if she were a man, and this question must be considered just as if Congress had enacted a law providing that any male citizen of the United States marrying a foreign woman should take the citizenship of his wife, regardless of whether he had left the country.

"A woman is a citizen of the United States within the meaning of the first section of the

Fourteenth Amendment to the Constitution of the United States; sex is not involved."

Abbot Law Dict.

See, also,

Minor v. Happersett, 21 Wall. (U. S.) 162;

State v. Howard Co. Court, 90 Mo. 593;

Ritchie v. People, 155 Ill. 98;

In re Lockwood, 154 U. S. 116;

Shanks v. Dupont, 3 Pet. (U. S.) 242.

It is, therefore, plain that plaintiff at the time of her birth became a citizen of the United States, notwithstanding her sex. It is not denied that she remained a citizen of the United States until August 14, 1909, when she married Gordon Mackenzie, a resident alien. How, then, did she lose her citizenship?

### C. LOSS OF CITIZENSHIP.

There are only two methods known to American Law by which there can be a loss of citizenship. One, relating to deserting soldiers and sailors, is under statutory provision enacted by Congress under the power expressly conferred by Section 8, Article I, of the Constitution of the United States, which provides that Congress shall have power to make rules for the government and regulation of land and naval forces. The other is by expatriation. By an Act approved March 3, 1865, Congress provided,

"That in addition to the other lawful penalties of the crime of desertion from the military or naval service, all persons who have de-

served the military or naval service of the United States, who shall not return to said service or report themselves to a provost marshal within sixty days after the proclamation hereinafter mentioned, shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens."

13 Stats., L. 490.

This provision is distinctly a military measure, and is limited to the purposes provided in the portion of the section just quoted. The Courts have insisted that the person must have been convicted by a court martial in order for the Act to apply.

Kurtz v. Moffitt, 115 U. S. 501;

Gotchens v. Matthewson, 61 N. Y. 420;

State v. Symonds, 57 Me. 148;

Severance v. Healy, 50 N. H. 448;

Huber v. Reily, 53 Pa. St. 112.

The power exercised by Congress under this statute is not expatriation, but is a punishment for crime by withholding the rights and privileges of citizenship from the offender, which rights and privileges, however, may be restored.

Plaintiff, of course, does not come within the provisions of this statute. She is not a deserting seaman or sailor, and it is, of course, not contended here that she has been expatriated as a punishment for her marriage. The provisions in this statute not applying to her case, we may, therefore, disregard it, but before leaving this discussion, we wish to draw the attention of the Court to the fact

that, as was said In re Look Tin Sing (21 Fed. Rep. 905), this is the only provision of the Constitution of the United States which empowers Congress to deprive a citizen of his citizenship without his consent.

#### D. DEFINITIONS OF EXPATRIATION.

"Expatriation: Specifically in law the forsaking of one's own country with a renunciation of allegiance and with a view of becoming a permanent resident and citizen in another country."

Webster's Universal Dictionary.

"Expatriation: The voluntary act of abandoning one's country and becoming the citizen and subject of another: Accorded by Sec. 1999, Rev. Stats. U. S."

Bouvier's Law Dictionary.

The derivation of the word determines its meaning better than any definition. The Standard Dictionary gives it as follows:

"*LL. expatriatus*, pp. of *Expatrio*, < *L. ex*, from, + *patria*, fatherland, < *pater*, father."

Thus we see that the term means literally, "from the fatherland".

See, also,

14 Op. Attys. Gen., 295;

Morse on Citizenship, p. 114, Section 82;

Black's Law Dictionary.

## E. THE RIGHT OF EXPATRIATION.

At Common Law, it was generally established that no citizen or subject possessed the power of throwing off his allegiance without his sovereign's consent. This was termed the doctrine of perpetual allegiance. This doctrine was never the law of the United States. Defendants are entirely in error in their contention that the Common Law doctrine of perpetual allegiance maintained by England was accepted by the United States. While there may have been a few expressions to that effect by judicial and diplomatic officials, the prevalent doctrine of this country always has been that a citizen had the right to expatriate himself.

"A denial of the right of expatriation is a restraint upon human liberty and happiness, denying to a person the right to emigrate and abandon his native country, and against the liberty of the Roman Law and contrary to American principles. Cicero in his Orations highly eulogized this feature of the Roman Law. The United States fought with Britain the War of 1812 to sustain the right of expatriation and protect naturalized citizens."

The Fourteenth Amendment, by Brannon,  
at p. 21.

See, also:

In re Look Tin Sing, 21 Fed. Rep., at p. 907;

9 Op. Attys. Gen. 62;

9 Fed. Stats. Ann., pp. 390 and 391.

Whatever conflict which may have existed upon this question prior to 1866, was, however, definitely

settled by the enactment by Congress of the statute now Section 1999 of Rev. Stats. of U. S.

#### F. THE NATURE OF EXPATRIATION.

Expatriation is a natural and inherent right.

7 Cyc. 144;

Brown v. Dexter, 66 Cal. 39.

The United States has recognized expatriation by statute as a natural and inherent right.

“Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.”

U. S. Rev. Stats., Sec. 1999.

#### G. ACTUAL REMOVAL A NECESSARY ELEMENT OF EXPATRIATION.

Expatriation is evidenced only by *actual emigra-*

*tion*, coupled with *other acts* indicating an intention to transfer one's allegiance.

Vol. 6 Am. & Eng. Ency. of Law, p. 31;

14 Op. Attys. Gen. 295;

9 Op. Attys. Gen. 62;

Juando v. Taylor, Fed. Cas. No. 7558 (2 Paine 652).

In order that expatriation may be considered to have taken place there must be an actual removal from the country of which the individual is then a citizen or subject made by a person of full age and under no disability, as the result of a fixed determination to change the domicile and permanently reside elsewhere, as well as to throw off the former allegiance, and become the citizen or subject of a foreign power.

7 Cyc., pp. 145, 146, and cases cited.

There must also exist a *voluntary* intent to remove. A citizen who is forced to remove from his own country and reside in another does not thereby lose his citizenship.

Hardy v. De Leon, 5 Tex. 211.

"It (expatriation) cannot be exercised by one while residing in a country whose allegiance he desires to renounce nor during the existence of hostilities; no subject of a belligerent can transfer his allegiance or acquire another citizenship, as the desertion of one's country in time of war is an act of criminality, and to admit the right of expatriation, '*flagrante bello*', would be to

afford a cover to desertion and treasonable aid to the public enemy."

Sec. of State Fish, House Doc. 326, 59th Cong., 2d Sess., p. 28.

"There can be no dispute that the most certain evidence of intention of expatriation from a country is departure from it with intent not to return. The parent laws of our citizenship and naturalization laws were the Virginia laws of 1779 and 1782, which were drawn up by Thomas Jefferson, who recommended the enactment of the Federal Law of 1802, upon which our system of naturalization rests. The Virginia Law of 1779 is notable because it contained a provision for expatriation in the following terms:

'That whensoever any citizen of this commonwealth shall by word of mouth in the presence of the court of the county wherein he resides, or of the general court, or by deed in writing under his hand and seal, executed in the presence of three witnesses, and by them proved in either of the said courts, openly declare to the same court that he relinquishes the character of a citizen *and shall depart the commonwealth*, such person shall be considered as having exercised his natural right of expatriating himself, and shall be deemed no citizen of this commonwealth from the time of his departure. (Chap. IV, vol. 10, p. 129, Henning's Stats. at Large.)'

Before the right of expatriation was generally recognized by the courts of the United States, it was held that if it existed permanent departure from the United States was the proof of it. \* \* \* That is to say, if it can be done it can be done by a bona fide change of domicile."

Report of Committee, House Doc. 326, 59th Cong., 2d Sess., p. 27.

## H. NATURE OF ALLEGIANCE.

Allegiance is defined as the obligation of fidelity and obedience that an individual owes to his Government or sovereign, in return for the protection he receives.

Standard Dictionary.

It has been defined by this Court as a mutual compact which cannot be dissolved by either party without the consent of the other.

Inglis v. Sailors' Snug Harbor, 3 Pet. (U. S.) 99;

It being a mutual compact, which cannot be dissolved by either party without the consent of the other, it has been held that:

"No act of the Legislature can denationalize a citizen without his concurrence."

Burkett v. McCarty, 73 Ky. (10 Bush) 758.

Also that,

"The sovereign cannot discharge a subject from his allegiance against his consent, except by disfranchisement as a punishment for crime."

Ainslie v. Martin, 9 Mass. 454.

## I. POWER OF CONGRESS OVER CITIZENSHIP.

The Constitution of the United States is a grant of power, and Congress has no authority other than that expressly conferred upon it by the Constitution. Ours is a Government of enumerated and delegated powers. The Constitution of the United

States is the only source of power authorizing action upon any branch of the Federal Government.

"It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal Government."

Dorr v. U. S., 195 U. S. 138.

"The Government of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication."

Martin v. Hunt, 1 Wheat. (U. S.) 326.

"This government is acknowledged by all to be one of enumerated powers. The principle, that the Government can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

M'Culloch v. Maryland, 4 Wheat. (U. S.) 405.

This principle is now so universally established that it needs no further citations to substantiate it.

We therefore must look to the Constitution to find the authority of Congress for the Act of March 2, 1907, under which it is claimed this plaintiff has been deprived of her citizenship. The only provision that can be found, other than that respecting deserting sailors and seamen (which we have treated, *supra*, pp. 21-22), is the naturalization

clause of the Constitution, which confers upon Congress power,

“To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States.”

Par. 4, Sec. 8, Art. 1, U. S. Const.

Nowhere else in the Constitution, do we find any provision under which it may be claimed that Congress had authority to enact the Act of March 2, 1907, and particularly section 3 thereof. This section of the Constitution gives to Congress the power to enact “an uniform rule of naturalization.” This is a *grant* of power to do an *affirmative* act. It is undisputed that Congress has unlimited power to *confer* citizenship upon whomsoever it chooses and under such conditions as it pleases. The power to take away citizenship is, however, an entirely different power and nowhere in the Constitution do we find Congress given express authority to do so.

Recognizing that there is no express power conferred upon Congress to expatriate, defendants contend (Defts’ Br. p. 25) that the arbitrary right of expatriation is in Congress upon the theory that it is an implied power. No power, however, can be implied which is not necessary and proper to carry into execution the powers expressly granted.

Granting, however, for the purpose of the argument that certain authority over expatriation resides in Congress by implication, nevertheless

such implied power is not unlimited. It is not an arbitrary and despotic power under which Congress may take from a citizen his rights of citizenship without that citizen's consent.

"The power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of government."

Dred Scott v. Sanford, 19 How., (U. S.)  
393, 15 L. Ed. at p. 719.

The jurisdiction of Congress over expatriation exists within well defined boundaries by reason of the very nature of expatriation itself. It, as we have shown (*supra*, p. 25), is an inherent right dwelling in the individual citizen, and expressly recognized as such by our Government (U. S. Rev. Stats. Sec. 1999, *supra*).

Expatriation has not only been declared a natural and inherent right by the political branch of our Government, but is universally upheld and sustained as such by the Courts as well.

Jennes v. Landes, 84 Fed. 73;

U. S. v. Crook, 5 Dill. (U. S.) 453;

Brown v. Dexter, 66 Cal. 39.

Being a natural and inherent right, it can be exercised only by voluntary act and concurrence of the citizen himself. This concurrence moreover may be expressed only by actual removal with no *animus revertendi*. One of the very essentials of expatriation and without which a citizen cannot

exercise his right, is actual removal from the country (*supra*, pp. 25-27).

The power of the Government over expatriation is by the very nature of the act itself, limited merely to an acceptance or recognition of the act of the individual as constituting expatriation. If it were otherwise and Congress had unlimited power to declare what acts constitute expatriation and consequently could deprive a citizen of his rights of citizenship without limitation or hindrance, the very nature of expatriation would be changed and instead of being a natural and inherent right residing in the individual citizen, it would become a power to take away citizenship residing in the Government and Congress could thereby deprive every citizen of his citizenship without cause or reason. That there is a limitation upon the power of the Government to expatriate, is a principle clearly and well established.

“No act of the Legislature can denationalize a citizen without his concurrence.”

*Burkett v. McCarty*, 73 Ky., (10 Bush) 758.

“The sovereign cannot discharge a subject from his allegiance against his consent except by disfranchisement as a punishment for crime.”

*Ainslie v. Martin*, 9 Mass. 454.

No citizen can be excluded from this country except in punishment for crime.

*In re Look Tin Sing*, 21 Fed. Rep. 905.

Counsel for defendants frankly admit that there is a limitation upon the power of Congress to expatriate. He says, "No one claims that Congress has the power, by mere *fiat*, to declare citizenship lost, regardless of *an act* of the citizen (Defts' Br. p. 27).

When defendants' counsel admit that Congress has not the power to deprive a citizen of his citizenship by mere *fiat*, he admits away his whole case. For if Congress has no such unlimited power, it must be conceded that its declaration that an act constitutes expatriation must be limited to those things which by their nature constitute expatriation. According to the very nature of expatriation, the legislation of Congress upon the subject must be limited to the establishment of a rule that when a citizen elects to divest himself of the right of citizenship, the act expressive of that election shall be admitted by the Government as constituting expatriation. In other words, the authority of Congress over expatriation is limited to giving its consent.

This Court has recognized limitations upon the power of Congress over citizenship.

"The Constitution does not authorize Congress to enlarge or abridge the rights of citizens."

Osborn v. Bank of U. S., 9 Wheat. (U. S.)  
738, 6 L. Ed. 204 at p. 225.

"The power of naturalization vested in Congress by the Constitution is a power to confer

citizenship, not a power to take it away. \* \* \* The 14th Amendment, while it leaves the power where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth declared by the Constitution to constitute a sufficient and complete right of citizenship."

U. S. v. Wong Kim Ark, 169 U. S., at pg. 703.

The Wong Kim Ark case arose through the attempt of the immigration officials to exclude Wong Kim Ark from the United States under the immigration laws, because of the fact that he had left the United States and gone back to China. The law stated that no Chinese persons of certain classes could come into or return to the United States. Wong Kim Ark fell into this class and the officials attempted to deport him. The Supreme Court of the United States decided two questions, (1) that he was a citizen within the provisions of the Fourteenth Amendment and (2) that he could not be excluded from the United States, or lose any of the rights of citizenship by reason of his departure from the United States on a temporary visit; that the only method by which he could lose his citizenship was by exercising his natural and inherent right of expatriation and doing and committing some act renouncing his citizenship. The Court held that the mere act of leaving the United States on a temporary visit did not deprive Wong Kim Ark of his citizenship, notwithstanding the provisions of the statute of the United States which

specifically provide that he could not return. The Court held that such a statute could not apply to a citizen of the United States and that, insofar as it pertained to a citizen of the United States, it was without effect, as being beyond the power of Congress.

“The acts of Congress, known as the Chinese exclusion acts, the earliest of which was passed some fourteen years after the adoption of the Constitutional Amendment, cannot control its meaning, or impair its effect, but must be construed and executed in subordination to its provisions.”

*Idem*, at page 699.

To the same effect, *In re Look Tin Sing* (21 Fed. Rep. 905). Here the question squarely arose as to the right of Congress to prevent the re-entry of a citizen into the United States under and by virtue of a statute which prescribed that he could not re-enter after once leaving its jurisdiction. The opinion was written by Mr. Justice Field, and the citation upon this point is as follows:

“As to the position of the District Attorney, that the restriction act prevents the re-entry of the petitioner into the United States, even if he be a citizen, only a word is necessary. The petitioner is the son of a merchant, and not a laborer, within the meaning of the act. Being a citizen, the law could not intend that he should ever look to the government of a foreign country for permission to return to the United States, and no citizen can be excluded from this country except in punishment for crime. Ex-

clusion for any other cause is unknown to our laws, and beyond the power of Congress."

In *re Look Tin Sing*, 21 Fed. Rep., at pp. 910-911.

There is a direct analogy between these two cases and that of petitioner. Congress in the case of these Chinese attempted to say that they lost certain rights of citizenship by reason of their temporary removal from the country. In the case at bar Congress has attempted to say that the petitioner has lost her citizenship by an act which in itself is lawful and the encouragement of which has been considered good public policy. The Supreme Court of the United States has said in the *Wong Kim Ark* case that Congress has no jurisdiction to limit the right of citizenship by birth. The Circuit Court of Appeals, speaking through Mr. Justice Field in the *Look Tin Sing* case has said that no citizen can be excluded from this country except in punishment for crime, and that exclusion for any other cause is unknown to our laws and beyond the power of Congress.

The Supreme Court of California has sought in its opinion, and counsel may seek in his brief, to distinguish between the limitation upon the power of Congress declared by these Chinese cases and the limitation set up by this petitioner. The only difference, however, is that the power claimed for Congress in the cases cited was *less* than the power claimed to exist in Congress by the defendants in this case. In the cases cited, it was sought

*to place certain limitations upon the rights of citizenship. In this case, it is sought to take away the citizenship of petitioner entirely. If Congress has no power to limit the rights of citizenship, how much less has it the power to take away citizenship from a citizen.*

**PLAINTIFF'S CONSENT NOT IMPLIED.**

Counsel may seek to avoid this argument by setting up the contention that Congress by this Act has not attempted to deprive plaintiff of her citizenship by the exercise of an arbitrary power, but has merely stated that the doing of a certain act by the plaintiff would deprive her of her citizenship and that the doing of the said act *implies* consent on her part.

This argument will not stand analysis. If defendants' contention be sound, then there can be no such thing as a constitutional right. Congress could deprive a citizen of any right by declaring that his consent to part with the right is implied upon his doing of a certain act, which in itself is lawful and which in its nature is not indicative of his desire to part with that right. Likewise, in this case, if Congress has the power to set the standard and to declare the doing of *any* act constitutes expatriation and may presume or imply the consent of the citizen by reason of his doing that act, then it has absolute power over the rights of citizenship and may by *fiat* declare a citizen expatriated. Expatriation then, as a right residing in

the individual, will cease to exist and the admitted limitations on Congress over citizenship will be defeated. For instance, suppose Congress, in the Chinese Exclusion Acts, had declared that any American born Chinese returning to China for any purpose should forfeit his American citizenship and should become a Chinese subject; Congress may decide that public policy requires such a law concerning a man who had gone to the country of his father; yet we think counsel will concede such a law entirely beyond the power of Congress. Or Congress might declare that any male citizen carrying on trade with a citizen of a foreign nation is deemed to be expatriated. Again Congress might declare that any woman who marries a man carrying on trade with a citizen of a foreign nation is presumed to have expatriated herself. It will, we think, be admitted by defendants' counsel that Congress has no such power. Such admission establishes the principle that the power of Congress over citizenship is not unlimited and plenary, but that it exists within well defined limitations. The line is drawn somewhere and we think the place of demarcation plain. We claim that Congress has no power over expatriation other than to accept from the individual his renunciation of allegiance, which renunciation must be such an act as in itself has been considered by custom, the Courts and the authorities as one constituting expatriation; that expatriation cannot occur or be admitted by Congress to have occurred unless the citizen has done

some act with intent to denationalize himself coupled with actual removal from the country. That intent cannot be presumed from the doing of a lawful act, which in itself is not indicative of the desire to exercise the right of expatriation.

The facts of the Dred Scott case (19 How. (U. S.) 390), are apt to illustrate the unsoundness of defendants' contention. In that case, Congress, by the Act of March 6, 1820, known as the "Missouri Compromise", declared that slavery should be forever prohibited in all that territory of the United States North of 36 degrees 30 minutes North Latitude. Dred Scott, the plaintiff in error was a negro slave and was brought by his owner into a free state (Illinois), and into free territory of the United States and was kept there for about four years. The taking the slave into free territory was done *after* the passage of the law and was the *voluntary act* of the owner, who knew at the time that there existed a law of Congress which declared that the taking of a slave into that territory emancipated him. According to the reasoning of defendants' counsel in this case, such act could therefore have been implied as a consent on the part of the owner to the emancipation of the slave. This Court, however, dealt with the whole question fundamentally and declared that inasmuch as the right of ownership in the slave was expressly recognized by the Constitution, any statute of Congress attempting to limit or take away that right was wholly null and void

as being beyond the power conferred upon Congress by the Constitution. The owner, could of course have emancipated the slave, but that would be by a voluntary act done for that purpose, such as giving him a document declaring him free, just as in this case, plaintiff could have become a citizen of Great Britain by doing some act which in itself was expressive of that desire, such as going to England. The only act which she performed was to marry.

#### **MARRIAGE IN ITSELF NOT AN ACT OF EXPATRIATION.**

The facts of this case resolve themselves into the question whether or not Congress has the power to declare that the only act committed by plaintiff—her marriage to a resident foreigner,—shall expatriate her. At the time the Act of March 2, 1907, was enacted, it was the settled rule in the United States that an American woman marrying a resident alien did not lose her citizenship by reason of said marriage if she continued to reside within the jurisdiction of the United States. The Committee examining the subject and upon whose report the legislation was passed, found only one reported case of a native born American woman marrying a resident foreigner and remaining within the jurisdiction of the United States. The Committee says:

“But one case has been found in which the citizenship of a native American citizen (woman) who has married a resident alien has been called in question, and that is in the

case of *Comitis vs. Parkerson*, 56 Fed. 556.  
 \* \* \* The Court, disapproving the earlier case of *Pequignot vs. Detroit*, *infra* (though calling attention to certain distinguishing facts of that case), held that the plaintiff in this case did not lose her citizenship by reason of her marriage to an alien resident."

Report on the Subject of Citizenship, Expatriation and Protection Abroad. House Doc. No. 326, 59th Cong., 2d Sess., p. 150.

The case of *Pequignot v. Detroit* (16 Fed. 211), referred to in the Committee's report was that of an alien woman who acquired American citizenship by marriage to an American citizen under the Act of 1855 and who subsequently remarried a foreigner. The facts of the case were distinguished by the Court in *Comitis v. Parkerson*.

Since the adoption of the Act of March 2, 1907, there has been but one reported case involving the citizenship of a native born woman of the United States who married a resident foreigner and remained subject to the jurisdiction of the United States. That case also held that the mere marriage itself could not be held to expatriate the woman; that in order to constitute expatriation, the marriage must be coupled with actual removal from the country.

*Wollenberg v. Mo. Pac. R. R. Co.*, 159 Fed. Rep. 217.

Prior to the Act of March 2, 1907, it was the

uniform rule that the mere act of marriage did not constitute expatriation.

Comitis v. Parkerson, 56 Fed. 554;  
 The Fourteenth Amendment, by Brannon, at  
 p. 28;  
 15 Opp. Attys. Gen. 599;  
 10 Opp. Attys. Gen. 321;  
 Ruckgaber v. Moore, 104 Fed. 947;  
 Shanks v. Dupont, 3 Pet. (U. S.) 242;  
 Beck v. Magillis, 9 Barb. 35.

Marriage is in itself a lawful act. Marriage and being given in marriage is a daily occurrence; that act in itself has no effect upon the citizenship of those entering the marriage relation.

#### DOCTRINE OF MERGING OF IDENTITY.

It may, however, be contended by defendants that it is not necessary for plaintiff to have become *expatriated* in order to have lost her citizenship. Counsel may claim that the mere fact of marriage deprives her of her citizenship under the theory that the wife's identity became upon marriage merged into that of the husband. This contention will not stand. In the first place, under the pleadings, the sole reason for refusing plaintiff registration was upon the theory that she had become *expatriated*, under the provisions of the Act of March 2, 1907. In the next place this Court has time after time declared that a woman has the same rights under the Constitution as has a male and that sex is not involved in questions of citizenship (see *supra*, pp. 20-21).

It is true that the English and Continental Courts have held for a long time to the doctrine of the merging of the identity with that of her husband. Under such a doctrine, the wife was held not to have a citizenship separate and apart from that of her husband. In contemplation of law, she and her husband were one and that one was the husband. This doctrine, however, in so far as it involves the *political* rights of a woman has never been the law in the United States.

Shanks v. Dupont, 3 Pet., (U. S.) 242;

Comitis v. Parkerson, 56 Fed. 558;

Note, 22 L. R. A. 150, 152.

The doctrine of the merging of identity is obsolete and the cases decided upon such reasoning are no longer authority. This Court has, in a very recent case, held that a woman, during coverture, may go into another state and secure a residence separate and apart from her husband in order to entitle her to sue a third person, and in wiping away the objection to such right of the wife, which objection was based upon the contention that she was a married woman and as such could have no residence separate and apart from her husband, declared that the doctrine of identity of person was "a vanishing fiction".

See

Williamson v. Ostenson, 232 U. S. 619; 58 L. Ed. 758.

We find that the authorities cited by defendants, supporting the doctrine that a woman loses her citizenship by marriage, are based upon the reasoning that the doctrine of the merging of identity obtained in the United States.

See,

In re Rionda, 164 Fed. Rep. 368,  
in which the Court says:

“This decision is only important as it asserts the importance of maintaining an undivided allegiance in the family relation. It is inconsistent with the policy of our laws that the husband should be a citizen and the wife an alien.”

See, also,

U. S. v. Cohn, 179 Fed. Rep. 835.

The Court here again based its decision upon the archaic doctrine of merging of identity, saying:

“The general trend of legislation has been constantly toward the recognition of the proposition that the husband is the head of the family and that his wife and minor children take his citizenship, it being inconsistent with the theory of our laws that the wife should be a citizen and the husband an alien, and vice versa.”

On the contrary, the general trend of legislation in the United States has constantly been away from the proposition that the husband and wife are *politically* the same. The movement has grown constantly toward the proposition that the

wife is a *political* entity apart from her husband. This fact has passed the stage of argument and is now a reality.

The following eleven states and one territory have granted women full equal suffrage:

Alaska (a territory), Arizona, California, Colorado, Idaho, Kansas, Montana, Nevada, Oregon, Washington, Utah and Wyoming.

Full equal suffrage now prevails in the United States over 1,738,040 square miles, with a population of 8,253,240. Illinois has granted presidential and municipal suffrage to women. The total votes in the Electoral College cast by the states having presidential equal suffrage is 91.

Twenty-two states have granted partial suffrage to women. They are as follows:

Connecticut, Delaware, Florida, Iowa, Indiana, Illinois, Kentucky, Michigan, Massachusetts, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, South Dakota, Vermont and Wisconsin. There are only fourteen states in the Union where woman suffrage does not prevail to some degree.

The argument that it is the *policy* of our laws that there should be an undivided allegiance in the family relation needs for its refutation only the statement of fact that every child born in the United States becomes a citizen irrespective of the citizenship of its parents. Such a policy is there-

fore impossible under our Federal Constitution. A family in the United States cannot remain of the same nationality. No more reason exists why the wife should take the nationality of her husband than that the children should take the nationality of their father. By the Fourteenth Amendment to the Constitution, every person born in the United States is a citizen. By virtue of that provision the child of this plaintiff is a citizen of the United States. What of the "policy" of our laws which the learned judge in the case, *In re Rionda* (*supra*), declares makes necessary an undivided allegiance in the family?

**PLAINTIFF'S CITIZENSHIP NOT DEPENDENT UPON  
INTERNATIONAL LAW.**

A great part of defendants' brief is devoted to an effort to uphold the Act of March 2, 1907, upon the theory that such legislation is necessary to evidence the assent of the United States to the rule of international law that the husband and wife must be of the same nationality. It is not necessary for plaintiff to cite many authorities to the proposition that no constitutional rights or privileges of an American citizen can be abridged or taken away by international law.

"There is no law of nations standing between the people of the United States and their government and interfering with their relation to each other."

Scott v. Sanford, 19 How., (U. S.) 393; 15  
L. Ed. at p. 720.

However desirable it might be to bring the legislation upon this subject into harmony with the legislation of other countries, whose citizens have no written constitution to guarantee them their rights, such legislation would be absolutely null and void unless enacted under some authority conferred upon Congress by the Constitution. It is needless to argue or cite authorities to the proposition that the power of Congress cannot be enlarged by international law. Plaintiff, having been born in the United States, was a citizen thereof and having performed no act which of itself constitutes expatriation, has not renounced her citizenship and is still a citizen of the United States. Her rights are measured by the Federal Constitution and cannot be taken away by international law or laws made in conformity therewith.

Counsel has cited *Shanks v. Dupont* (3 Pet., (U. S.) 242) to the proposition that the political rights of plaintiff rest upon principles of international law (Defts' Br. p. 51). Whatever weight this citation may have had, it no longer is controlling, as this Court in the case of *U. S. v. Wong Kim Ark* (169 U. S. p. 660), held that the question whether a person is a citizen of a country does not depend upon international law, but is to be determined by the law of that country.

According to the contention of defendants, plaintiff has lost her American citizenship by reason of her having become a British subject. Nowhere does the Act, under which it is claimed that plaintiff has

lost her citizenship, specifically provide that an American woman shall *forfeit* her American citizenship by marrying a foreigner. The declaration of the Act is that, "any American woman marrying a foreigner, shall take the nationality of her husband". Nothing is said about the loss of American citizenship and that penalty can only be *implied* as resulting from the taking of the nationality of the husband. It is, therefore, only by implication that it may be said that the Act provides for the loss of American citizenship. Whether plaintiff has lost her American citizenship under this Act depends entirely upon whether she has become a subject of Great Britain and, unless the Act does in fact confer English citizenship upon her, she has not lost her American citizenship.

The Congress of the United States has, of course, no power to confer British citizenship upon this plaintiff. Yet, under the theory of defendants, plaintiff has by force of this declaration by Congress become a British subject, without ever having come within the jurisdiction of the British Crown.

It must be conceded that Congress cannot compel the British Government to accept the citizens of this country as citizens of Great Britain by statutory enactment. Whether that can be brought about by treaty provision, is not a question here involved, as no treaties have been concluded between the two countries upon this subject. The whole question rests upon the Act of March 2, 1907.

According to the argument of defendants, however, plaintiff has become a subject of Great Britain, because a British statute provides that any woman marrying a British subject takes the nationality of the country of her husband. It therefore follows, according to defendants' argument, that plaintiff's nationality rests upon the laws of Great Britain. If tomorrow the Government of Great Britain should repeal this statute, plaintiff presumably would be deprived of her enforced British citizenship. In that event, we do not know whether defendants would consider that her American citizenship had reverted to her or decide that she was that,—which is the only thing worse than a man without a country—a woman without a protecting sovereign. The Court in *re Look Tin Sing* (*supra*), says:

“No American citizen ought ever to look to a foreign country for permission to return to the United States.”

Equally no American citizen should look to a foreign country for the status of his citizenship.

The British statute has no effect outside of the jurisdiction of Great Britain, and could not operate to reach anyone within the jurisdiction of the United States. The plaintiff could, of course, avail herself of the British statute, by taking her departure from the United States and going within the jurisdiction of the British Crown. In that case she would have exercised her inalienable right of expatriation.

# DEFENDANTS' AUTHORITIES DISTINGUISHED.

The principal argument of defendants' brief is that marriage confers the citizenship of the husband upon the wife *ipso facto* and many cases are cited to support this contention. The argument, however, is confused by counsel's failure to distinguish between the exercise of the authorized power of Congress to confer citizenship and the lack of power to take away citizenship. The power of Congress to confer citizenship is unlimited. It has no power to take away or deprive a citizen of his citizenship, except as a punishment for crime. The only authority which Congress has over expatriation is to accept from the citizen his exercise of the right of expatriation. As was said by the Supreme Court of the United States in the Wong Kim Ark case (p. 703),

"The power of naturalization vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away."

And as was said by this Court in the Dred Scott case (pp. 417, 420, 578):

"The power of naturalization granted to the Federal Government is confined to the removal of the disabilities of foreign birth."

The cases cited and discussed by defendants and which it is argued sustain defendants' contention that Congress has power to deprive a citizen of her citizenship by reason of her marriage, are not in point. They are cases in which Congress has exercised its authorized power to *confer* citizen-

ship upon any woman marrying a citizen of the United States. (Rev. Stats. U. S. Sec. 1994.)

The cases cited are not cases of native born American women marrying resident foreigners and remaining within the United States, but are cases either (1) of American women marrying non-resident foreigners and who themselves had left the jurisdiction of the United States, or (2) of alien women marrying citizens of the United States. The citizenship of those American women marrying non-resident foreigners and removing from the United States was lost by reason of their actual removal from the country through the doctrine of expatriation; the citizenship of the alien women marrying citizens of the United States was gained by virtue of Section 1994, Revised Statutes of the United States, enacted by Congress under its constitutional power to *confer* citizenship.

The case of *Kelly v. Owen*, 7 Wall., (U. S.) 496, cited by counsel, is that of an alien woman acquiring citizenship by reason of marriage to an American citizen. The same is true of practically all of the cases cited by counsel on pages 7 and 8 of his brief and is particularly true of the cases of *U. S. ex rel. Nicola v. Williams*, 134 Fed. Rep. 322 and *U. S. ex rel. Gendering v. Williams*, 184 Fed. Rep. 322, discussed by counsel upon pages 10 and 11 of his brief.

The cases entitled "*In re Rionda*, 164 Fed. Rep. 368," and "*U. S. v. Cohn*, 179 Fed. Rep. 634," are

cases concerning the naturalization of *alien* women and involving the express power of Congress to naturalize. The Court held, in those cases, that Congress had not intended to *confer* citizenship upon those women.

The contention of counsel that the case of *Comitis v. Parkerson*, 56 Fed. Rep. 556, is now one in their favor, cannot be maintained when the reasoning upon which the Court based its decision is understood. The Court held that even if Congress had intended to declare that a woman became expatriated upon her marriage, this declaration would not deprive such a woman, continuing to reside within the United States, of her citizenship. The Court stated at pages 559-560:

"But even if Congress in the preamble to the Act of 1868 had meant to declare that there might be expatriation effected in connection with other means than by naturalization abroad, the settled doctrine as to expatriation would prevent the plaintiff from being regarded as expatriated. *Expatriation must be effected by removal from the country.* It cannot be denied that whatever right of expatriation Congress meant to declare by the Act of 1868 is, in the express language of the preamble, based entirely upon the inborn right to seek happiness by free removal from one country to another. *It could not therefore have been intended by Congress in that act that citizens should expatriate themselves and remain permanently within the country.* The right is limited to or conditioned upon actual removal, by the public writers."

## V. Failure of California Court to Pass Upon Two Important Points.

The decision of the California Court (Trans. of Rec. pp. 7-13), has failed to decide two important points, or properly speaking, has raised two points and then has left them undecided. The first is regarding the right to vote by an alien woman acquiring citizenship by her marriage to an American citizen. The Court says:

"It is not entirely certain that, under our State Constitution, such citizenship (by virtue of marriage to an American citizen), would entitle such foreign born women to vote. Our Constitution confers that privilege only on three classes of persons; first, native citizens; second, those who became citizens under the Treaty of Queretaro \* \* \* and, third, naturalized citizens. An alien woman who marries a citizen thereby herself becomes a citizen, but there may be doubt if she thereby becomes a naturalized citizen within the meaning of the Constitution. This is, of course, a question not here involved. We mention it only to call attention to the distinction and to make it clear that we have not decided it" (Trans. of Rec. p. 9).

A decision on this question is important. There are a large number of foreign born women in California claiming American citizenship by reason of their marriage to American citizens. Plaintiff may also be interested personally in the determination of this question; for if it should be held that she has lost her American citizenship and is now an alien, the only method whereby she may regain

American citizenship is through the naturalization of her husband. In that event, according to the intimation conveyed in the portion of the decision of the Supreme Court of California quoted above, that Court may hold that she is not a naturalized citizen within the meaning of the term as used in the California Constitution. . The Act of 1855 (now Sec. 1994, Rev. Stats.) was enacted under the power of Congress to establish an uniform rule of naturalization and provided that a woman marrying an American citizen shall be deemed a citizen provided she is of the class of persons for whose naturalization the previous Acts of Congress provide. Therefore, it seems to us that Congress intended to provide this means of acquiring citizenship by a woman in lieu of formal steps of naturalization and that when she acquires citizenship under said act, she in reality has become naturalized. This question has been considered in several cases, and the Courts have reached this conclusion.

Mr. Justice Harlan, said in *U. S. v. Kellar*, 13 Fed. 82, that the woman, upon her marriage, therefore with a naturalized citizen of the United States \* \* \* became, under the plain words of Sec. 1994, *ipso facto*, a citizen of the United States, as fully as if she had complied with the provisions of the statutes upon the subject of naturalization".

"The phrase, 'shall be deemed a citizen,' in section 1994, Rev. Stat., or as it was in the act of 1855, *supra*, 'shall be deemed and taken to be a citizen', while it may imply that the person to whom it relates has not actually become

a citizen by the ordinary means or in the usual way, as by the judgment of a competent court, upon a proper application and proof, yet it does not follow that such person is on that account practically any the less a citizen. The word 'deemed' is the equivalent of 'considered' or 'adjudged'; and, therefore, whatever an act of Congress requires to be 'deemed' or 'taken' as true of any person or thing, must, in law, be considered as having been duly adjudged or established concerning such person or thing, and have force and effect accordingly. When, therefore, Congress declares that an alien woman shall, under certain circumstances, be 'deemed' an American citizen, the effect, when the contingency occurs, is equivalent to her being naturalized directly by an act of Congress, or in the usual mode thereby prescribed.'

Leonard v. Grant, 5 Fed. 11.

This precise point has also arisen in another case, where the right to vote of a woman naturalized under this section was questioned. The Court held that she was "naturalized" to the same extent as if judicial proceedings had been had.

Dorsey v. Brigham, 177 Ill. 250.

See also,

Naturalization in the U. S., Van Dyne,  
pp. 238-240.

The other point left undecided by the California Court, was whether the Act of 1907 applies to women who married foreigners before the Act was passed. We join with counsel in his expression of hope that this Court will decide this point. We, however, do not believe that the Act in any event

should be held to include those women married prior to March 2, 1907. *Kelly v. Owen*, 7 Wall. (U. S.) 496, is not authority to the proposition that the Act includes all women that were married to foreigners prior to the adoption of the Act of March 2, 1907. That case, as we have pointed out, was dealing with a statute enacted under the express power to naturalize conferred upon Congress by the Constitution and Congress therefore had the power to confer naturalization upon all women then married, or who in the future might become married, to American citizens. At the time the Act of March 2, 1907, was enacted, it was the settled law of the United States that marriage to a resident foreigner did not deprive an American woman of her citizenship. Therefore, Congress may not subsequently take away citizenship for an act which at the time it was done was lawful and not contrary to public policy, and which at the time it was performed, did not constitute cause for the loss of citizenship.

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### Conclusion.

Plaintiff submits her claim to American citizenship upon the foregoing grounds. She comes to this Court for protection against the attempts to take away from her a right guaranteed to her by the Constitution of the United States, confident in the belief that this Court will grant her protection.

“It is the duty of courts to be watchful for the constitutional rights of the citizen, and

against any stealthy encroachments thereon.  
Their motto should be *obsta principiis*."

Boyd v. U. S., 116 U. S. 616, at p. 635.

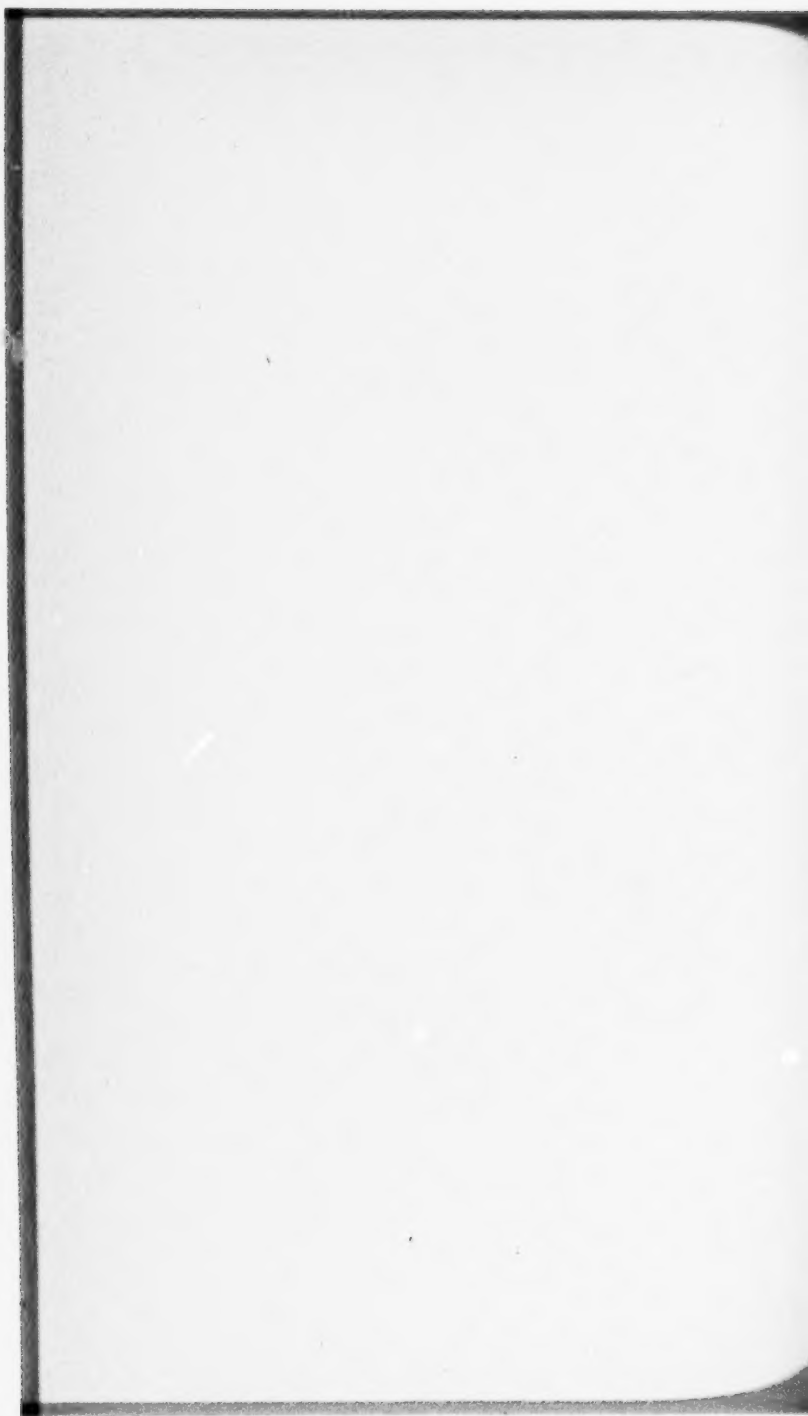
It is respectfully submitted that the judgment of the Supreme Court of California should be reversed with directions to the Supreme Court of California to issue a peremptory writ of mandate, directing defendants in error to register plaintiff in error as a native citizen of the United States.

Dated, San Francisco,  
March 25, 1915.

Respectfully submitted,

MILTON T. U'REN,  
*Attorney for Plaintiff in Error.*

U'REN & BEARD,  
*Of Counsel.*



(24,074)

# In the Supreme Court

OF THE  
United States

OCTOBER TERM, 1914

No. 379

79

Office Supreme Court, U. S.  
FILED  
MAR 9 1915  
JAMES D. MAHER  
CLERK

ETHEL C. MACKENZIE,

*Plaintiff in Error,*

vs.

JOHN P. HARE et al.,

*Defendants in Error.*

## BRIEF FOR DEFENDANTS IN ERROR.

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City Attorney of the City and County  
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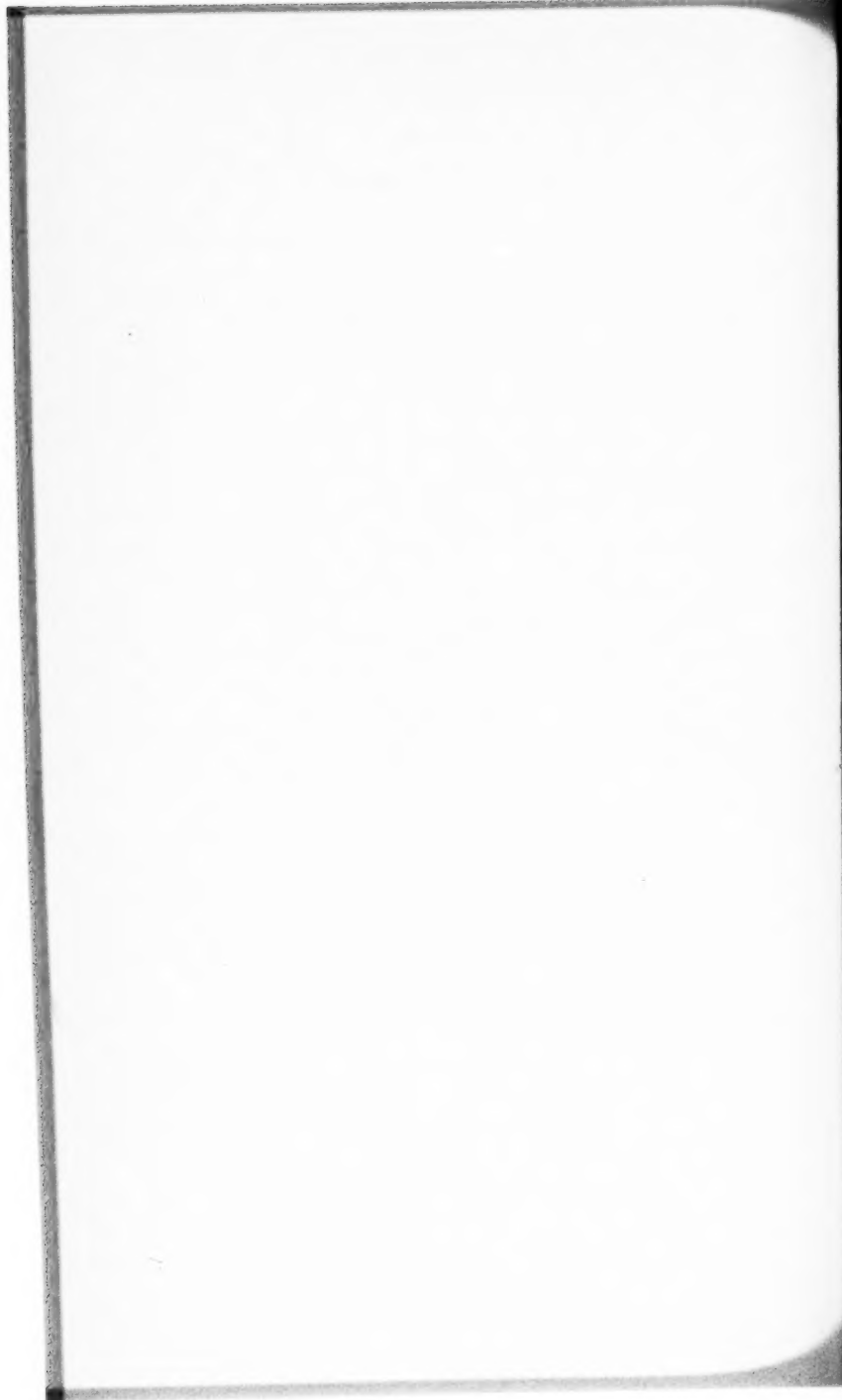
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Filed this.....day of February, 1915.

JAMES D. MAHER, Clerk.

By.....Deputy Clerk.



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(24,074)

**In the Supreme Court**  
OF THE  
**United States**

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OCTOBER TERM, 1914

**No. 376**

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ETHEL C. MACKENZIE,

*Plaintiff in Error,*

vs.

JOHN P. HARE et al.,

*Defendants in Error.*

**BRIEF FOR DEFENDANTS IN ERROR.**

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I.

**CONGRESS DOES NOT LEGISLATE WITH A VIEW TO AFFECT  
SUFFRAGE.**

The State of California is at liberty to grant the right of suffrage to any person whether native, or alien, wholly untrammled by any rule of citizenship of the United States, and subject to no limitations save the inhibition of the 15th Amendment to the Federal Constitution. The State of California, however, has by Section 1, Article II of the State Constitution required

that a person shall be a citizen of the United States at the time he or she claims the right of suffrage, and therefore the failure of the petitioner to have the right of suffrage in California, is because of a limitation upon that right made by the State of California, and which the State is at liberty at any time to extend to the petitioner.

Said Article II reads as follows:

“Every native citizen of the United States \* \* \* shall be entitled to vote at all elections, which are now or may hereafter, be authorized by law.”

The United States, however, approaches legislation upon this branch of international law, without any reference to or consideration of any question of the right of suffrage, and solely to define what shall constitute acts of expatriation, and for the purpose of evidencing by statute the assent of the United States to the doctrine or principle of international law, upon this branch, as it exists in other nations.

It is the policy of this branch of international law that husband and wife be citizens of the same sovereign, and that there be no possibility of dual allegiance.

Mr. Cockburn, in his work on Nationality, p. 24, says:

“In every country except where the English law prevails the nationality of a woman on marriage merges into that of her husband, she loses her nationality and acquires his.”

Although Great Britain was asserting the doctrine of perpetual allegiance as to its citizens until the year 1870, yet in 1844 it began its approach to harmony upon this principle, by enacting as follows:

“Any woman married or who shall be married to a natural born subject or person naturalized shall be deemed and taken to be herself naturalized and have all the rights and privileges of a natural born subject.”

7 & 8 Vict. 154, Ch. 66.

Upon the 10th day of February, 1855, the United States enacted the following:

“Any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen.”

At a later date this enactment was compiled in the Revised Statutes of the United States in the following words:

“Any woman who is now or may hereafter be, married to a citizen of the United States, and who might herself be lawfully naturalized shall be deemed a citizen.”

(Section 1994 U. S. Comp. Stat. 1901, p. 1268.)

The American law is based on the British Act (Van Dyne on Naturalization, Ed. 1907, p. 229, Leonard v. Grant, 5 Fed. Rep. 13).

This was followed by Great Britain which by its general naturalization Act of May 12, 1870, abandoned totally its doctrine of perpetual allegiance, and in addition to its provisions for naturalization of British subjects in foreign tribunals, specifically in said Act of 1870, provided as follows:

“Section 10. The following enactments shall be made with respect to the national status of women and children:

(1) A married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject.

(2) A widow, being a natural born British subject, who has become an alien by or in consequence of her marriage, shall be deemed to be a statutory alien and may as such at any time during widowhood obtain a certificate of readmission to British nationality in manner provided by this Act."

(Naturalization Act 33 Vict., May 12, 1870, Sec. 10).

The United States completed the statutory evidence of the international comity upon this subject by the Act of March 2, 1907, Sec. 3 of which is as follows:

"Sec. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the terminal of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a Consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

(34 U. S. Stat. at Large, p. 1228.)

This Act is perfectly clear upon its face.

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#### EARLIER CASES NOT DECISIVE ON PRESENT QUESTION.

From the beginning of the American government down to its declaration by Congress in 1868 as to the right of freedom of expatriation, there was a conflict of authority upon the question of the right of a United States citizen to renounce allegiance, or become a citizen of another country.

The courts by the weight of authorities until 1855 adhered to the doctrine of the common law maintained by England, of perpetual allegiance, and held that a woman could not by marriage, change her citizenship, because the government had not given its consent. Occasionally there was an expression of views based upon the opposite doctrine of the Roman or civil law which gave the free right of expatriation.

The leading case upholding the English common law view of perpetual allegiance was *Shanks v. Dupont*, 3rd Peters U. S. 242.

This line of authorities however are without application in considering the present doctrine in the United States by reason of the Act of Congress of July 27th, 1868, announcing its policy of expatriation as a natural and inherent right of all people, and the legislation by Congress on the subject.

In *Pequignot v. City of Detroit*, 16 Fed. Rep. page 211, Circuit Court, Michigan (1883), Mr. Justice Brown (afterwards Associate Justice of the Supreme Court of the United States) referring to *Shanks v. Dupont*, supra, at page 213, says:

"On page 246 the Court briefly observes that the marriage of the British officer did not produce that effect, because the marriage with an alien, whether a friend or an enemy, produces no dissolution of the native allegiance of the wife; giving as its reasons for this ruling: (1) That no persons can, by any act of their own, without the consent of the government, put off their allegiance and become aliens; (2) if it were otherwise, then a *feme alien* would by marriage become, *ipso facto*, a citizen,

and would be dowable of the estate of her husband, which are clearly contrary to law."

The learned Justice then proceeds as follows:

"Now the general doctrine above stated, that no person can put off his allegiance without the consent of the government is no longer the law in this country, since it is expressly declared by revised statute Sec. 1999."

The learned Justice then quotes the said declaration of 1868 as to the right of expatriation and continues as follows:

"The second reason too is no longer law, since, by the Act of February 10th, 1855, (Rev. St. Sec. 1994) 'any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be naturalized shall be deemed a citizen.' It seems to me therefore that we ought to apply the maxim '*cessante ratione, cessat lex*', to this case and are not bound to treat it as controlling authority. It seems to me too, that we should regard the sections above quoted as announcing the views of Congress upon this branch of international law, and ought to apply the same rule of decision to a case where a female American citizen marries an alien husband, that we should to a case where an alien woman marries an American citizen."

The learned Justice after referring to the case of *Kelly v. Owen*, 7 Wall. 496, and other cases and opinions of Attorney Generals upholding the doctrine that marriage by an alien woman to an American citizen effected an *immediate* change of nationality regardless of the residence of the wife uses the following language:

"It will be noticed that legislation upon the subject of naturalization is constantly advancing toward the idea that the husband, as the head of the

family, is to be considered its political representative, at least for the purposes of citizenship and the wife and minor children owe their allegiance to the same sovereign power."

This case decides that a woman who had become an American citizen and afterwards married a citizen of France and continued to reside with her husband in Detroit, Michigan, took the citizenship of her husband although she continued to so reside in the United States.

It is to be observed that expressions of the Courts referring to any necessity of residence abroad, were mainly made before the declaration of policy of the United States of July 27, 1868, with reference to the right of expatriation, and were based upon the acceptance of the English or Common Law rule of perpetual allegiance; or were based upon *treaty*, as was the case in *Shanks v. Dupont*, *supra*; and the few expressions made since 1868, adopting a similar idea are drawn from such expressions previous to 1868. The line of decisions in construing the Act of 1855 have been substantially uniform to the effect that the marriage, conferred citizenship of the husband upon the wife, *ipso facto*, regardless of the residence of the wife, or whether she ever resided in the United States.

In support of this statement the following cases are cited in many of which the wife never resided in the United States and in some of which she did not so reside at the time of the marriage.

1869 *Kane v. McCarthy*, 63 N. C. 299;

1879 *Headman v. Rose*, 63 Ga. 458;

- 1883 *Ware v. Wisner*, 50 Fed. Rep. 310;  
 1868 *Kelly v. Owen*, 7 Wall. U. S. 496;  
     *Dorsey v. Bingham*, 177 Ill. 256;  
 1883 *Piquignot v. Detroit*, 16 Fed. Rep. 211;  
 1904 *Hopkins v. Fachant*, 130 Fed. Rep. 829-  
     842-843;  
 1882 *U. S. v. Kellar*, 13 Fed. Rep. 82 (and see  
     note pp. 85-86);  
 1880 *Leonard v. Grant*, 5 Fed. Rep. 13-14;  
 1889 *Halsey v. Beer*, 52 Hun. (Sup. Ct. Rep.,  
     N. Y.) 366;  
 1885 *People v. Newell*, 38 Hun. (Sup. Ct. Rep.,  
     N. Y.) 79;  
 1888 *Gaum v. Hubbard*, 97 Mo. 311-321;  
 1893 *Kirchner v. Murray*, 54 Fed. Rep. 617-621;  
 1911 *U. S. ex rel. Nicola v. Williams*, 184 Fed.  
     Rep. pp. 322;  
 1911 *U. S. ex rel. Gendering v. Williams*, 184 Fed.  
     Rep. pp. 322;  
 Opinion by Williams, Attorney General U. S.,  
     June 13, 1874, 14 O. P. Atty. Genl. p. 402.

In this opinion the Attorney General after citing several of the above cases says—that it is settled that the marriage confers citizenship upon the wife irrespective of the time or place or residence of the parties.

To the same effect instructions by Secretaries of State, Mr. Frelinghuysen to Mr. Lawrence, March 31, 1883 MSS.

Mr. Frelinghuysen, Secretary of State, September 22, 1875.

Mr. Frelinghuysen to Mr. Foster, April 2nd, 1883.

(The above instructions cited in Webster on the Law of Citizenship, page 298.)

To the same effect Mr. Wharton, Assistant Secretary of State to Mr. Phelps in Haberacker's case March 26th, 1891. Instructions to Germany, foreign relations 1891, 508.

Mr. Frelinghuysen to Swedish Minister April 10th, 1882.

Same to Mr. Welch January 31, 1884.

Mr. Day, Secretary of State, the same effect 1897.

(See Moore Dig. International Law pp. 453-454.)

(See Webster on Citizenship pp. 298.)

At the last place referred to Mr. Webster says:

"The rule does not require residence in the United States; a woman who is married to a citizen of the United States partakes of his citizenship though residing abroad." (Citing *Kelly v. Owens* and other cases.)

Mr. Moore in "Digest of International Law", vol. 3, p. 456, referring to the Act of Congress of 1855, says:

"The statute applies to a woman married to a citizen of the United States irrespective of the time or place of marriage, or the residence of the parties, even though the woman lived at a distance from her husband and never came to the United States until after his death." (Citing cases, etc.)

In the very recent cases:

United States ex rel. Nicola v. Williams;

United States ex rel. Gendering v. Same, 173

Fed. Rep. 626.

(District Court S. D. New York, October 29, 1909). A naturalized citizen of the United States went to the Empire of Turkey and there married Nicola, a subject of the Sultan of Turkey. After living some time with her in that Empire he brought her to the United States, and she was stopped by the immigration authorities on the ground that she had Trichoma and should be excluded as an alien.

The Court held that she became a citizen immediately upon her marriage and could not be deported as an alien or prevented from entering the country.

In the second case the wife came from Holland to the United States and married a Hollander who was likewise an alien, and lived with him in New York City. Thereafter and *before* her husband was naturalized, she left her husband and lived with a paramour, and with said paramour returned to Holland, and *while she was so in Holland*, her husband became a naturalized citizen of the United States. *After* his said naturalization she returned from Holland with her paramour, and was stopped at Ellis Island under the immigration Act on the ground that she was being imported for immoral purposes and was an alien.

The Court held that she became a citizen upon the naturalization of her husband in the United States, notwithstanding she had never resided with him in the United States after he became a citizen.

These cases of Nicola and Gendering v. Williams were taken by appeal to the Circuit Court of Appeals

of the 2nd Circuit, N. Y., and decided before Judges Lacombe, Coxe and Ward.

(See 184 Fed. Rep. page 322.)

The said Circuit Court of Appeals affirmed the said rulings of the lower Court, and at page 323 the Court says:

"In the recent case of *United States v. Henrietta Cohen*, 179 Fed. 834, 103, C. C. A. 28, decided June 14, 1910, we held that the alien wife of an alien man who had resided here for 30 years could not herself become an American citizen for the reason that she took the nationality of her husband and this remained until the marriage relation was legally terminated. This decision is only important as it asserts the importance of maintaining an undivided allegiance in the family relation. It is inconsistent with the policy of our law that the husband shall be a citizen and the wife an alien."

*In re Rionda*, District Court S. D., New York, 1908 (164 Fed. Rep. p. 368).

The Court denies naturalization to an alien woman married to an alien residing in the United States, giving substantially the same reasons as are stated in the case of *United States v. Henrietta Cohen*, supra.

At page 368, the Court says:

"It is explicitly provided by the United States laws"; (the Judge here quotes in full Section 3 of the Act of March 2nd, 1907, that an American woman who marries a foreigner shall take the nationality of her husband, etc.) and continues as follows:

"If, therefore, the applicant had been an American woman, she would have taken the nationality of her foreign husband and it is difficult to see how a foreign born married woman is in a position to acquire the rights given by naturalization."

In the case of *U. S. v. Henrietta Cohen*, an alien woman, married to an alien Russian citizen, *resident in the United States* (Circuit Ct. of Appeals, 2nd Cir. N. Y., June 14, 1910, before Coxe, Ward and Hazel, J. J., 179 Fed. Rep. 834). At page 835 the Circuit Court of Appeals says:

"As was pointed out by Judge Henry B. Brown in *Pequignot v. Detroit*, 16 Fed. 211, the general trend of legislation has been constantly toward the recognition of the proposition that the husband is the head of the family and that his wife and minor children take his citizenship, it being inconsistent with the theory of our laws that the wife shall be a citizen and the husband an alien and vice versa."

The Court then quotes Section 3 of the Act of March 2, 1907, and continues as follows:

"It is plain that Congress here intends that the wife shall assume the nationality of her husband even to the extent of expatriation in the case of an American woman. Though an American citizen prior to her marriage she cannot resume that citizenship while the marriage relation continues. It seems wholly inconsistent with the spirit of this legislation to permit an alien to acquire rights which are denied to a citizen. If an American woman had married Cohen she would immediately have become a Russian citizen and would be such today with no power to change her citizenship until the matrimonial relation is terminated by death or otherwise."

This array of authorities coming down almost to the present hour and the last cases cited referring specifically to the Act of March 2, 1907 (and being the only cases referring to that Act), are conclusive upon the point that the residence of the wife under said Act is

immaterial and that it is the *act of marriage*, which *ipso facto*, causes her to take the nationality of the alien husband.

These decisions in the New York District Court and Circuit Court of Appeals, referring to the Act of March 2, 1907, as last mentioned, give the same interpretation to that Act which it has received in the Department of State at Washington, D. C., which is charged with its execution, and which was presided over at the time of such enactment by Secretary Root, as evidenced by a letter furnished by the Department of State, to Congressman William Kent, upon the same subject, of which letter the following is a copy:

“(Copy/L)

DEPARTMENT OF STATE  
Washington

March 13, 1912.

The Honorable William Kent,  
House of Representatives.

Sir:

The Department has received your letter of the fifth instant with which you transmit a copy of a bill to amend Section 3 of the Act of March 2, 1907, by adding the following proviso: ‘that the provisions of this section shall not apply to any woman who is entitled under the laws of any State to vote at all elections which are now or which may hereafter be authorized by the laws of any such State.’ You ask whether the questions have been presented to the Department of a woman marrying a foreigner and going abroad to live, and of a woman marrying a foreigner and continuing to reside in the United States with no intention of departing therefrom, and, if so, what opinion has been rendered. Both questions have been presented to the Department, and the Department has held, under the provision of the Act of March 2, 1907, ‘that any

American woman who marries a foreigner shall take the nationality of her husband', that any American woman loses her citizenship upon her marriage to a foreigner, whether she resides abroad or remains in this country. The Act of 1907 merely declares the rule which, it is believed, prevails in practically every civilized country in the world. Thus Cockburn, in his work on Nationality (page 24), says:

'In every country except where the English law prevails, the nationality of a woman on marriage merges in that of her husband, she loses her nationality and acquires his.'

Since this was written the British Act of Parliament of 1870 has been passed, which declares that a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject.

For many years before the passage of the Act of 1907, the practice of this Department conformed to this general international rule. The entire subject is very fully discussed in Van Dyne on Naturalization, p. 242 et seq.

I have the honor to be, Sir,

Your obedient servant,

HUNTINGTON WILSON,

136./5

Acting Secretary of State."

(MSS. March 12, 1912.)

The correctness of the assertion that controversy over this point had ceased in the State Department for a considerable period before the passage of the Act of March 2, 1907, is further evidenced by the manuscript instructions to Mr. Wildman, Consul at Hongkong, from the Department of State, No. 30, March 24 (1898), as follows:

"It is the practice of the Department of State to decline to issue passports to the American born

wives of foreigners, who continue to reside in the United States after marriage."

(Moore Dig. V. 3, 454.)

Talbot v. Johnson, Santissima v. Trinidad, and Shanks v. Dupont, were based on the English view of perpetual allegiance, and in the *absence of any statute by Congress*, and only the latter related to a woman, and she was held to have become a subject of Great Britain (*not because of marriage and removal, but by treaty*). That case has been misapprehended by some.

Comitis v. Parkerson, Louisiana, June 17, 1893;

Billings, District Judge, 56 Fed. Rep., page 556.

This case, upon examination, in the light of the *subsequent* enactment of the said Act of March 2, 1907, is *now a strong case in favor* of the position taken by respondent.

At page 559 the Court, after referring to the subject of expatriation, says, with reference to the absence of any law on the subject:

"So that with reference to the question before the Court the law is left where it was previous to the year 1868, and Congress has made no law authorizing any implied renunciation of citizenship."

And again, at page 563, the Court uses the following language:

"My conclusion, for the reasons which I have just stated, is that on the question of naturalization and expatriation the judgment of the Courts must not outrun the action of Congress, and that the Court must carefully observe the lines of demarkation which the Congress has drawn; that any imperfections or inconsistencies in those lines must

be supplied and corrected by Congress, and not by the Courts."

Ruchgover v. Moore, 104 Fed. Rep. 948.

This case was decided in 1900. As the wife actually went to France and lived there, there was no question before the Court of the nature now presented. The citation of Piquignot v. Detroit, 16 Fed. Rep. 211, must have been by mistake, as it holds directly contrary to the views expressed by Judge Thomas. The citation of Comititis v. Parkerson, is without value (at this time) as has been shown above.

In this Ruchgover case, the judgment was correct under any of the cases, but the dictum was not. It was doubtless for this reason that the Circuit Court of Appeals (2nd Circuit, N. Y.) affirmed this judgment, *without any opinion* (See 114 Fed. Rep. 1020), as the *same* Court of Appeals *later* in the Nicola, and Gendering, cases, *supra*, state the principle of decision directly opposite to the dictum, of Thomas J. in the Ruchgover case.

Wollenberg v. Missouri Pac. R. Co., 159 Fed. Rep. 217 (February 14, 1908), W. H. Munger, District Judge, Nebraska.

This case was decided shortly after the Act of March 2, 1907, but shows plainly, upon its face, that such Act was *not* called to the attention of the Court.

Upon April 25, 1912, Mr. Thomas V. Cator wrote to Judge Munger a letter upon the subject and received the letter back by return mail with an endorsement in the following words, "The statute in question was *not*

called to my attention at the hearing in the above case. W. H. Munger, Judge."

The said letter was exhibited to the California Supreme Court and opposing counsel, at the oral argument.

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**ANALYSIS OF THE CASE OF WONG KIM ARK, 169 U. S. p. 649.**

This case, which is cited by opposing counsel, is also cited by respondents as expressly stating that the citizenship of a native born citizen *may be lost or taken away* by his own acts. An examination of the *context* which must be read in connection with the expressions of the Court at page 703, show that there is nothing whatever favorable to the petitioner in the case. But it would appear that without examination of the dissenting opinion, which *in part forms the context*, which must be read in connection with page 703, the petitioner's attorney, has cited this case.

Wong Kim Ark was born in the United States in 1873, of parents who were subjects of the Emperor of China, and incapable under Act of Congress, of being naturalized in the United States. The parents were domiciled at his birth in California and remained residents there until he was 17 years of age, when they departed for China. In 1890, and again in 1894, Wong Kim Ark made temporary visits to China, returning each time to the United States; he had never changed his residence from California, and always claimed to be a citizen of the United States.

The case was submitted upon stipulated facts which, among others, contained the following:

“That said Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom.”

The expressions of the Court on page 703 of the opinion that,

“The power of naturalization vested in Congress by the Constitution is a power to confer citizenship, not a power to take it away, etc.” together with all said on that subject at that page have not the slightest reference to the power of *expatriation*, which the Court speedily and *fully concedes* on the following page, viz: 704, where it is said,

‘No doubt he might himself, after coming of age, renounce this citizenship, etc.’ ”

*The appropriate context which must be read in connection with the matter referred to at said page 703, is not fully manifest unless the dissenting opinion of the Chief Justice commencing at page 705 be examined. The Chief Justice denied that the English Common Law rule applied in the manner claimed by the opinion of the Court.*

The chief point of divergence, between the basis for the opinion of the Court, and that of the dissenting opinion, arose over the effect to be given to the limitation of the *naturalization laws*, to persons of the white and African race, and the incapacity of natives of China to be naturalized. (See pages 701 and 702 and Acts and treaties quoted.)

The dissenting opinion took the ground that although Wong Kim Ark was born in the United States, yet as he was born of parents *forbidden* to become naturalized in the United States, the English Common Law rule did not apply, and that he was not to be considered born "subject to its jurisdiction".

At page 732 the dissenting opinion closes with the following words:

"In other words The Fourteenth Amendment does not exclude from citizenship by birth children born in the United States of parents permanently located therein, and who might themselves become citizens; nor, on the other hand, does it arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this Government, are and must remain aliens."

When these excerpts from the dissenting opinion are read, it is clear just what the *conflict at the consultation of the Court* was, and these quotations supply the *complete context* to the language used by the Court at page 703, previously referred to, as to the limitations on the power of naturalization, as a power to *confer*, and not to take away, and that it could neither enlarge or abridge the rights of a native, and is exhausted by the exercise of making a rule of naturalization.

In the light of said quotations from the dissenting opinion it is clear that the expressions of the Court referred to at page 703 are made by way of *reply*, or *anticipated reply*, to the views which would be expressed by the dissenting opinion, viz: that the naturalization laws which forbade the naturalization of the parents,

affected the status of the native born child, and *prevented* his being born "subject to the jurisdiction", of the United States.

The majority opinion declares that the power of naturalization (and the power of naturalization only is spoken of at this place, page 703) is an affirmative power to provide rules for the naturalization of persons and that Congress cannot by the mere *omission* to provide for the naturalization of the foreign parents, nor by *forbidding* their naturalization "restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship."

Such was the divergence of views as to the *effect* of *naturalization laws*.

There was not the slightest idea of *questioning* the power of Congress *to define acts of expatriation*; as is evidenced fully by the language of the Court at page 704, relating to expatriation and renouncing of citizenship. The Court excuses itself from an inquiry as to whether Wong Kim Ark had *lost his citizenship* since birth, by referring to the *stipulation* that he had not by himself or by his parents acting for him *ever renounced* his allegiance, etc. (See pages 704 and 705.)

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## II.

### HISTORY OF THE ACT OF MARCH 2, 1907.

On April 13, 1906, the United States Senate passed a joint resolution providing for a Commission to examine into the subjects of citizenship of the United

States, expatriation, and protection abroad, and to make report, etc.

On the 6th of June, 1906, the House Committee on Foreign Affairs, to which the said Senate resolution had been referred, reported to the house as follows:

"It is the opinion of the Committee that legislation is required to settle some of the embarrassing questions that arise in reference to citizenship, expatriation, and the protection of American citizens abroad."

(See House Document No. 326, 59th Congress, 2nd Sess.)

The House Committee then continues its report by recommending that the Secretary of State select a Committee of gentlemen connected with the State Department, who have given special attention to these subjects, to prepare a report on proposed legislation, etc.

Pursuant to this, Secretary Root selected a Committee of three, who made a report dated December 15, 1906, which was transmitted by the Secretary of State, which closes with the following words:

"I transmit herewith the result of their labors. I beg to commend it to the consideration of the House as a very clear and thorough exposition of this most important subject, upon which it seems to be generally agreed legislation is much needed.

I have the honor to be, sir, your obedient servant,  
ELIHU ROOT."

Mr. Van Dyne on Naturalization (ed. 1907) page 255, refers to these proceedings in the following manner:

"ACT OF MARCH 2, 1907. To resolve any doubt that might exist because of variant decisions of

the Courts and opinions of Secretaries of State, as to the effect of the marriage of an American woman to an alien, the Citizenship Commission of 1906 recommended and Congress enacted the following law."

After at this point quoting in full Section 3 of said Act of March 2, 1907, relating to an American woman who marries a foreigner, Mr. Van Dyne, at page 256, continues and uses the following language:

"This law not only served to settle definitely and in the same manner that the matter has been fixed by statute in most other civilized countries, the citizenship of married women, but it removed from the sphere of 'executive legislation' the constantly recurring question of the reversion of nationality of married women upon the death of their alien husband."

This Act was proclaimed by the President of the United States on April 6, 1907.

At page 336 of said edition of Mr. Van Dyne on Naturalization, it refers to this matter as follows:

"The Act of Congress 1868 (15 Stat. at L. 223, Chap. 249, U. S. Comp. Stat. 1901, 1269), does not define what steps must be taken by a citizen before it can be held that he has become denationalized. In fact, until the enactment of the law of March 2, 1907, 'in reference to the expatriation of citizens and their protection abroad', there was no mode of renunciation of citizenship prescribed by our laws, with the exception of Section 1998 of the revised statute, by virtue of which desertion from the Army or Navy works forfeiture of the rights of citizenship. Whether expatriation had taken place in any case was to be determined by the facts and circumstances of the particular case. No general rule that would apply to all cases could be laid

down. The law of March 2, 1907, expressly prescribes several modes by which citizenship of the United States may be renounced."

At page 337 Mr. Van Dyne on Naturalization (edition of 1907), after quoting from the said Act of March 2, 1907, says:

"It will be observed that the Act declares that expatriation may be effected in four different ways, viz: By naturalization in a foreign state, by taking the oath of allegiance to a foreign state, by marriage of an American woman to a foreigner, and by residence of a naturalized citizen of the United States in a foreign country."

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### III.

#### THE FOURTEENTH AMENDMENT.

The 14th Amendment did not alter the status of free white persons as previously existing.

Ex parte Virginia, 100 U. S. 313.

In Wong Kim Ark, 169 U. S., at page 674, the Court says:

"Passing by questions once earnestly controverted but finally put at rest by the Fourteenth Amendment of the Constitution, it is beyond doubt that, before the enactment of the Civil Rights Act of 1866 or the adoption of the Constitutional Amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native born citizens of the United States."

The Fourteenth Amendment declares the status which is *acquired* by birth or by naturalization equally, but it in no way contemplates that this status cannot be *changed* by expatriation, or forfeited as by Section 1996 of the Revised Statutes of the United States, relating to desertion of the military or the naval forces of the United States. That such citizenship may be lost by expatriation, is clearly stated and conceded by the Supreme Court of the United States in the case of *Wong Kim Ark*, 169 U. S., where the Court, in speaking of a Chinaman whom it had held had become a citizen of the United States by birth, says, at page 704:

“No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country.”

That case interprets the declaration as to expatriation of 1868 as applying to our own citizens, as well as to foreign citizens, and recognizes the right of Congress to apply the doctrine of expatriation as a fundamental principle of the Republic.

Mr. Brannan, in his volume on “The Fourteenth Amendment”, under the head of “Expatriation”, says, at page 20:

“Federal citizenship is lost by expatriation.”

And again, at page 22, referring to the Declaration of 1868 relating to expatriation, he says:

“What acts effect it is left to the open law.”

At page 28, the same author treats of marriage as a mode of expatriation.

(This work was written in 1901, and before the Act of March 2, 1907.)

Opposing counsel says that we fail to distinguish between the affirmative power of congress in naturalization, and the negative power over expatriation.

There is no such thing as "*negative power*", known to law. All power is *affirmative*. Citizenship of the United States is a primary citizenship, and state citizenship is secondary, and derived from it.

Wong Kim Ark, 169 U. S. p. 678.

Congress has the power to define acts of expatriation, as fully as it has the power of naturalization. If it were necessary to treat the power as *implied*, it would not be doubted, as being *inherent* in sovereignty, of which citizenship is the fundamental subject.

"The design of the constitution was to establish a government competent to the direction and administration of the affairs of a great nation."

(Ency. of U. S. Supreme Court Reports, vol. 4, page 135, and cases cited, and pages 311-312-313.)

"The entire control of international relations is committed to the national government in peace as well as in war."

(Id. page 149, cases cited.)

Marriages between citizens of foreign nations are *international marriages*, and whenever occurring among persons of distinction, are commonly termed international marriages. As international marriages, they are not purely private arrangements between husband and

wife, any more than a domestic marriage, is a purely private matter. Every marriage creates a *status* and the State is a party in interest, even in domestic marriages, which are governed wholly by municipal law, and in like manner an *international marriage*, of a native woman to foreigner, creates a *status*, to which, the principles of international law, or comity, have a direct relation, and the sovereigns, to whom the parties owe allegiance prior to the marriage, have an *international interest*, in the *international status* of such a marriage, and have a right to declare the same, and in this case have done so by the aforesaid British Act of 1844, and Act of Congress of March 2, 1907.

“The United States is not only a government but it is a national government, and the only government in this country that has the character of nationality. It is invested with power, over all foreign relations of the country, war, peace, and negotiations and intercourse with other nations, all of which are forbidden to the state government.” (Legal tender cases.) 12 (Wall.) U. S. 457. Bradley, J., p. 555.

It cannot be doubted that Congress would have the power to provide for naturalization, and to make foreign persons citizens of the United States, without the specific grant contained in the Federal Constitution. That specific grant was for the purpose of insuring *uniformity*, and to divest the states of power over the subject. Expatriation, which is the *converse* power, to naturalization, is just as fully vested in Congress *without any specific grant*. This is recognized by the expressions of the judges and authorities mentioned in this brief.

The case of Wong Kim Ark, expressly affirms that he might renounce his citizenship by his own act. The quotation of a *single sentence* from that case which is made by opposing counsel might be misleading, and we ask attention to the full analysis of that case found in this brief.

No one claims that Congress has the power, by mere *fiat* to declare citizenship lost, regardless of *an act* of the citizen.

Some propositions of law stated, or cited, by petitioner, are irrelevant. Such is the reference to the Chinese Exclusion Act. This Act operates *only* upon aliens, not upon citizens. In *re Look Tin Sing*, 21 Fed. pages 910-911, quoted by petitioner, involved only the question, whether the petitioner became a citizen of the United States by birth. That being decided in the affirmative, it is added by the court, that the Exclusion Act is not applicable to citizens, and that citizens cannot be excluded except for crime, and are not dependent upon permission of any foreign country to return. This is all elemental, and undisputed, in the *sense*, in which the language is there used. Such an Exclusion Act has no relevancy, to an Act of Congress defining what shall constitute a *voluntary act*, which shall operate as a transfer of allegiance, in accordance with the recognized international policy of nations.

Opposing counsel cites *Comitis v. Parkerson*, *supra*, and in that case the learned judge affirms that the power of expatriation is vested in Congress saying at page 558 as follows:

“There can be no doubt but that the department of government which, in the distribution of authority under the constitution, has power over the subject of naturalization, has it also over the subject of expatriation. The constitution is silent on the subject of expatriation: but article 1, section 8, par. 4, provides that ‘Congress shall have power to establish a uniform rule of naturalization’. Where the constitution is thus silent as to who can denationalize, that department which can nationalize must be held to have authority to expatriate.”

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#### IV.

##### **EXPRESSIONS OF WRITERS AND THE COURTS WITH REFERENCE TO THE POWER OF EXPATRIATION.**

All writers on international law or on the subject of citizenship treat the power of the sovereignty over the subject of expatriation as fundamental.

Mr. Moore in his digest of International Law, vol. 3, p. 712, under the subject of expatriation, says:

“As Congress has not defined, by the statute of 1868 or otherwise, what may constitute expatriation, the Department of State is ‘forced to look elsewhere for an enumeration of the Acts’ which may have that effect.” (Citing Mr. Fish, Secretary of State, June 28, 1893.)

Mr. Van Dyne in his “Citizenship of the United States” under the head of expatriation (writing before the Act on March 2, 1907) says at p. 272:

“The Act of Congress of 1868 (15 Stat. at L. 223, Chap. 249, U. S. Comp. Stat. 1901, p. 1269) does not define what steps must be taken by a citizen before it can be held that he has become denationalized. In fact there is no mode of re-

nunciation prescribed by our laws. Whether expatriation has taken place in any case must be determined by the facts and circumstances of the particular case, no general rule that will apply to all cases can be laid down \* \* \* The most obvious and effective form of expatriation is by naturalization in another country. *But this is not the only mode by which expatriation may be effected.*" (The italics are ours.)

Mr. Wharton in his International Law Digest, vol. 2, sec. 176, p. 360, under the head of "Abandonment of Citizenship," says:

"Our citizens are certainly free to divest themselves of that character by emigration, and *other acts* manifesting the intention and may then become the subjects of another power." (The italics are ours.)

There is not a case or authority in the United States that questions the power of Congress by law to define and regulate expatriation of citizens.

They all assume the existence of that power and some of them have expressed a desire that such statutes definitely define the modes of expatriation.

Shanks v. Dupont recognizes the power of the sovereign over expatriation.

In the case of *The Charming Betsy*, 2nd Cranch U. S. p. 120, Justice Marshall says:

"Whether a person born within the United States, or become a citizen according to the established law of the country, can divest himself absolutely of that character, *otherwise that in such manner as may be prescribed by law*, is a question which it is not necessary at present to decide." (The italics are ours.)

As early as 1795 in a case involving expatriation the Supreme Court of the United States said: in *Talbot v. Jansen* (3 Dall. U. S. p. 154):

“A statute of the United States relative to expatriation is much wanted; especially as the Common Law of England is by the constitution of some of the States, expressly recognized and adopted. Besides, ascertaining by positive law the manner in which expatriation may be effected would obviate doubts, render the subject notorious and easy of apprehension, and furnish the rule of civil conduct on a very interesting point.”

President Grant, in his annual Message to Congress of December 5, 1876, speaking upon the same subject, of expatriation, and the need of definition by Congress, said:

“The United States has insisted upon the right of expatriation, and has obtained, after a long struggle, an admission of the principles contended for by acquiescence therein on the part of many foreign powers and by the conclusion of treaties on that subject. It is, however, but justice to the government to which such naturalized citizens have formerly owed allegiance, as well as to the United States, that certain fixed and definite rules should be adopted governing such cases and providing how expatriation may be accomplished.

\* \* \* The delicate and complicating questions continually occurring with reference to naturalization, expatriation, and the status of such persons as I have above referred to induce me to earnestly direct your attention again to these subjects.”

In *Murray v. McCarthy*, Supreme Court Appeals of Va. 2nd Mumford's Rep. p. 393 at pp. 396-397 (year

1811), the Court, speaking of the subject of expatriation, says:

"But although municipal laws cannot take away or destroy this great right they may *regulate the manner and prescribe the evidence of its exercise*, and, in the absence of the regulations *juris positivi*, the right must be exercised according to the principles of general law. *As we have no Act of Congress on this subject*, and as doubts are entertained whether our Act of Assembly concerning expatriation is still in force, or, admitting it to be in force, whether it was ever intended to apply to the case of a citizen of Virginia removing to and becoming a citizen of some other of the United States, I shall in considering McCarthy's citizenship confine myself to the principles of general or universal law." (The italics are ours.)

In *Comitis v. Parkerson*, 56 Fed. Rep. p. 556, at page 563, the Court says:

"My conclusion, for the reasons which I have thus stated, is that on the questions of naturalization and expatriation the judgment of the Courts must not outrun the action of Congress, and that the Courts must carefully observe the lines of demarkation which the Congress has drawn."

At page 559 the Court adds the following:

"So that with reference to the question before the Court the law is left where it was previous to the year 1868, and Congress has made no law authorizing any *implied renunciation* of citizenship." (The italics are ours.)

In *Pequignot v. Detroit*, *supra*, the learned Justice also recognizes that the Courts are to defer to what

they conceive to be the views of Congress upon this subject, saying, 246-247:

“It seems to me too, that we should regard the sections above quoted as announcing the views of Congress upon this branch of international law, and ought to apply the same rule of decision to a case where a female American citizen marries an alien husband, that we should to a case where an alien woman marries an American citizen.”

Now the Congress of the United States by the Act of March 2, 1907, *announced its views directly* upon this subject, to be *exactly in accordance* with what Mr. Justice Brown, in the last above quotation from *Pequignot v. Detroit* stated that the Court ought to attribute to Congress, and applied the same rule to a female American citizen who marries an alien husband that it had formerly applied by the Act of 1855 (and which Great Britain had applied by the Act of Parliament of 1844) to the cases, where an alien woman marries a citizen, or natural born subject, and which Great Britain by Section 10 of the Act of May 12, 1870, applies to its own female citizens who marry aliens.

It was to put an effective end to controversy and secure the same sovereign to husband and wife, and to avoid any conflict arising out of what is generally termed claims of “dual allegiance” that Congress enacted Section 3 of the Act of March 2, 1907, and also therein foreclosed all controversy upon the question of the status of the wife, after the death or divorce of the husband.

## V.

## ALL WRITERS ON THE LAW OF CITIZENSHIP TREAT MARRIAGE AS A MODE OF EXPATRIATION.

Mr. Cockburn on Nationality, page 24, says:

"In every country except where the English law prevails the nationality of a woman on marriage merges in that of her husband she loses her nationality and acquires his."

The countries where the English law prevails, to which he refers, have come into complete harmony with the principle that as above stated, by Acts of the British Parliament, and of Congress previously quoted.

In *Leonard v. Grant*, 5th Fed. Rep., p. 11, the Court at p. 13, says, speaking of Section 1994, R. S. U. S.:

"The American statute is substantially a copy of the British one of 7 and 8 Vict. c. 66, Sec. 16, 1844" and says further,—

"In considering the British statute, Pollock C. B., after citing it says: 'The obvious, plain and natural inference from that appears to me to be that she should be considered exactly as if she had been naturalized by Act of Parliament, or as if she had been a natural born subject.'"

And further quotes Wilde, C. J., in delivering the opinion of the British Court in exchequer chamber, *Regina v. Manning*, as saying:

"It appears to me that the general intention of the legislature in this Act of Victoria is to make the woman a British subject."

And Judge Deady then further quotes, from *Kelly v. Owen*, 7 Wall. U. S. 496, the following:

"His citizenship, *whenever it exists*, confers under the Act citizenship upon her." (The italics are ours.)

The Court further says, at p. 16:

"No law expressly providing for a temporary or contingent citizenship is known to the legislation of the United States and so unusual and singular a purpose ought not to be attributed to Congress without an explicit provision to that effect."

Among other writers who all treat marriage as a mode of expatriation are the following:

Van Dyne on Naturalization (edition 1907) pp. 333-357 and 227;

Van Dyne on Citizenship (See head "Expatriation");

Wharton "International Law Digest," Vol. 2, 420, Sec. 186;

Moore "Dig. International Law," Vol. 3, p. 448;

Webster "Law of Citizenship," p. 297, 298;

Brannan "The Fourteenth Amendment," p. 28;

Bouve "Exclusion of Aliens," pp. 389-390.

Mr. Wharton, under the head "Abandonment of Citizenship", says:

"Our citizens are certainly free to divest themselves of that character by emigration, and *other acts* manifesting the intention and may then become the subjects of another power." (The italics are ours.)

These definitions exclude the idea that emigration, is in *all* cases necessary. As an *international marriage*, as shown in Point VII of this brief creates a status, in which the sovereigns, both have an interest, it is for international law, or comity, to determine that interest, and provide the mode of expatriation.

It is not for private parties to a marriage, to determine what legal status of their voluntary acts shall constitute. As was said in *Leonard v. Grant*, 5th Fed. 13-14-15 in reply to a woman who claimed that she did *not intend to consent* to the status which the law attributed to her marriage:

“But the answer to this argument is found in the fact that an alien woman who marries a citizen of the United States must be presumed to assent to the obligations, duties, and *status* which the law provides shall be consequent upon the act of entering into such relation.”

Counsel for petitioner cites *Comitis v. Parkerson*, *supra*, frequently, but no case more fully admits the complete power of Congress to declare the allegiance of the wife transferred *ipso facto* by marriage to a foreigner. At page 558 the Court says:

“A change of the allegiance due to the United States, a throwing of it off on the part of a citizen, involves on the part of the Government an acquiescence from that Department of Government which, according to its constitution, must acquiesce in it; and, on the part of the citizen the manifestation of the purpose to expatriate himself by some unequivocal act, *which act must also be recognized by the Government to be adequate for that purpose.*” (The italics are ours.)

A suggestion of opposing counsel that deserting soldiers and sailors are expatriated by virtue of the military power is wholly irrelevant and immaterial. No authority is cited. If the military power is in

fact, an *additional* power in such respect, it still remains true that *they might* be expatriated *under the general power* of Congress over the subject of expatriation, and that Congress under such general power, has the right to annex such expatriation as a punishment for offenses by civilians. These matters only go to the *illustration of the fact*, that the general power of expatriation *may operate* without any necessity of the person expatriated *leaving the country*. It may operate in the same way with reference to voluntary act, of international marriage, whenever Congress shall by law declare such act to be adequate for that purpose. In *Burkitt v. McCarthy*, where a *state* statute forfeited citizenship for imputed *treason*, a divided court, thought the act must provide for a *conviction*, or that *crime* requires a judicial conviction. The opinion of Williams, J., found only in 1, Ky. Opinions, pages 104 to 118 inclusive, appears more sound and convincing. However, a state has no power over *international policy*, and whatever a state might think requisite, in cases of *crime*, is irrelevant to the case at bar, except as it shows that in such cases, *no removal*, is necessary to make the loss of citizenship effective.

The fact that marriage is an *innocent act*, in no way affects the fact, that it is a *voluntary act*, nor does it in any way limit the power of Congress to consent to the *status* which shall be recognized by international law or comity, as attaching to such international marriages.

## VI.

## VOLUNTARY RENUNCIATION.

Expatriation is defined as follows:

“Expatriation is the voluntary renunciation or abandonment of nationality and allegiance.”

Van Dyne on Naturalization (Edition 1907) p. 333.

Marriage by a woman to an alien is a mode of *naturalization*, by the principles of international comity, evidenced by statute in England and the United States and evidenced either by statute or consent in civilized nations.

Writers upon this subject and Courts treat such marriage as *naturalization*, and the common mode of legal expression in this matter is “naturalization by marriage”.

Mr. Van Dyne on Naturalization, treating upon this subject at page 227 (Edition of 1907) entitles the chapter in the following words:

“NATURALIZATION BY MARRIAGE.”

In the case of *Kelly v. Owen*, 7 Wall. U. S., the Court expressly states that the marriage *confers citizenship* upon the wife *whenever it occurs or exists*, under or pursuant to Section 1994 of the Revised Statutes of the United States.

In the case of the *United States v. Kellar*, 13th Fed. Rep., page 82. At page 84, the learned Justice quotes from *Kelly v. Owen* the following:

“As we construe this Act it confers the privileges of citizenship upon women married to citizens of the United States, if they are of the class of

persons for whose naturalization the previous Acts of Congress provide. The terms 'married' or 'who shall be married' do not refer, in our judgment, to the time when the ceremony of marriage was celebrated, *but to a state of marriage*. They mean that whenever a woman who, under previous Acts might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the Act or subsequently, or before or after the marriage, *she becomes by that fact a citizen also. His citizenship, whenever it exists, confers, under the Act, citizenship upon her.*" (The italics are ours.)

The learned Justice then refers to Section 2172 Revised Statutes of the United States which provides for the naturalization through the parents of "the children of persons who have been duly naturalized under any law of the United States", and with reference to the question whether or no such naturalization of the mother by such marriage only, brought her within the terms of that section, says, at page 84:

"The only doubt which might have arisen as to the application of that section to the present case is whether a woman, becoming a citizen, under section 1994, solely in virtue of her marriage with a naturalized citizen, can be said to have been '*duly naturalized*' under a law of the United States. That doubt, we have seen, is removed by the decision in *Kelly v. Owen*."

This view is in accord with the views of the English courts construing the British Act of 1844 referred to in *Leonard v. Grant*, 5 Fed. Rep. p. 11, *supra*.

This mode of naturalization by marriage, which operates as expatriation under the international comity so evidenced by the statutes referred to, and the statutes

or acquiescence, of other civilized nations, is a species of naturalization so adopted and recognized or established by such international comity with relation to the status of husband and wife, *only*, and stands upon a *mode peculiar to itself*, in all the nations which accept such international comity.

It will be observed that all these statutes, both in the United States and Great Britain, relating to naturalization by marriage, or expatriation by marriage, stand by themselves *independent of* and *separated from*, the other general provisions for naturalization by more formal applications and decrees of tribunals.

This word *renunciation*, is commonly used with reference to any thing or right, which is yielded up by reason of the consequences or effect of a particular marriage. Thus, if a last will and testament or other lawful instrument causes the right of inheritance or the possession of an estate, to rest contingent upon a clause forbidding remarriage, and the same is forfeited by such a remarriage, such a remarriage is always properly spoken of as a *renunciation*, or act of renunciation, on the part of the person who *elects* to abandon the inheritance or estate so contingent.

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## VII.

### TRANSFER OF ALLEGIANCE BY MARRIAGE RESTS UPON INTERNATIONAL PRINCIPLES, APART FROM THE IDEA OF EMIGRATION.

Great numbers of foreigners who owe allegiance to other sovereigns, and not to the United States, *reside*

*within* the United States. The husband of petitioner, resides within the United States, and owes allegiance to another sovereign. As he may occupy this position while resident in our country, why not the wife occupy the same position? There is only *one element essential* to this situation, and that is the *consent of the sovereign, to whom she formerly owed allegiance*. International law or comity, with reference to the wife taking the nationality of the husband upon marriage, has been administered upon the principle that while the marriage operates *ipso facto* to transfer the allegiance, as against all the world, and is effective everywhere, that it will not be administered in such manner that the new sovereign will claim its operation in the country, of the sovereign to whom the wife formerly owed allegiance, *against the will of such sovereign*. But if such sovereign has *consented* to a release of allegiance, then and in such event the transfer of allegiance made by the marriage, *ipso facto*, operates to make her the subject of the new sovereign, *everywhere*. (See Mrs. Gordon's case and authorities cited in Point XI of this brief.) If the spouses suffer joint injury in person or property, which is the subject of diplomatic intervention, their rights and remedy ought *not* to be different, or separated by diverse citizenship. If they desire to travel from the United States direct to countries other than Great Britain, their passport should be from the same sovereign, or one might be admitted, and the other not admitted. Then there is the conflict which it is always necessary for nations to guard against,

which arises from claims, of *dual allegiance*, if the international principle be not uniform in its operation, *regardless of residence*, to guard against which, was the very reason, for the express statute of March 2, 1907.

(See Report of Citizenship's Committee declaring *Pequignot v. Detroit*, to be sounder than *Comitis v. Parkerson*, as preventing *dual allegiance* (House Document 326, 59th Congress, 2nd Session, page 33).

The statutes of the various nations indicating consent to the principle of international law, that the wife by the marriage shall take the nationality of the husband, have, it will be observed done this by *statutes separate*, from the general laws of such nations providing for naturalization of actual emigrants, by formal proceedings in foreign tribunals.

The British statutes of 1844 and 1870, and the United States statutes of 1855 and 1907 are already quoted.

The Code Napoleon contains the French statutes on the subject in Sections 12 and 19:

"Section 12. A foreigner who shall have married a Frenchman shall follow the condition of her husband."

"Section 19. A Frenchwoman who shall espouse a foreigner shall follow the condition of her husband. If she become a widow she shall recover the quality of Frenchwoman; Provided she already reside in France, or if she return thither under the sanction of the government and declare at the same time her intention to fix there."

The provision of the Russian Civil Code, Article 1026, Ed. of 1876, is as follows:

“Every Russian subject who has married a foreigner, and thereby will be considered as a foreigner, has the right after the death of her husband, or after a formal divorce, to resume Russian allegiance, and in this case it will suffice for her to present to the Government of the province in which she may have chosen domicile a special certificate proving her widowhood or divorce. The document delivered by the Governor stating that the above certificate has been presented to him will be available to the person in question as proof of her resumption of Russian allegiance.”

(Moore International Law Digest, Vol. 3, p. 462.)

In 1896 Mr. Breckenridge, then American Minister at St. Petersburg, desiring to know the actual state of the Russian law upon this subject, addressed an inquiry to the Russian Foreign Office and received a reply from Mr. Chichkine as follows:

“Every Russian woman married to a foreigner embraces the nationality of the latter if the marriage has been contracted conformably to Russian law.” (Id.)

The learned Judge of the District Court, Southern District, New York, in *United States v. Williams* and *United States v. Gendering*, 173 Fed., page 626, examines the statute of the Ottoman or Turkish Empire upon this subject and states:

“Under the law of the Ottoman Empire, of which the relator in the first case was a subject, the relator’s marriage with a citizen of this country

changes her allegiance. This is clearly implied from the Turkish Nationality Law of January 26, 1869 (Article 7)." (See page 627.)

The learned Judge sets forth the statute and also its construction as given by a Turkish circular addressed to the Governor General of the Vilayets of the Empire.

The same learned Judge at page 628 of the same case sets forth the law of Holland upon this international principle saying:

"The law of Holland is the same as the law of Turkey in regard to the acquisition by a woman of a new allegiance through marriage." (And proceeds to quote the statute.)

We do not find the statutes of other nations upon this international principle, translated into the English, but it is sufficient to adopt the statement of Mr. Cockburn in his work on Nationality, already quoted.

Judge Brown in *Pequignot v. Detroit*, 16th Fed. 211, in holding that an American woman citizen, who married a Frenchman, where both continued to reside in the United States after marriage, took the nationality of her husband, *refers* at page 217, to the *Code Napoleon* upon this subject, to show that by her marriage to a Frenchman or citizen of France, she took the citizenship of France regardless of her residence with her husband in the United States. He *implied* the consent of our government from the Act of 1855.

## VIII.

THE ACT OF 1907, AS TO SECTION 3, WAS ADOPTED BY CONGRESS, FOR THE EXPRESS PURPOSE OF ANNOUNCING ITS EXPRESS CONFIRMATION OF THE DOCTRINE THAT MARRIAGE OF A NATIVE WOMAN TO A FOREIGNER, SHOULD OPERATE IN THE MANNER, DECIDED IN THE CASE OF PEQUIGNOT v. DETROIT, REGARDLESS OF THE RESIDENCE OF THE WIFE.

An array of authorities have been cited in this brief showing that the statute of the United States of 1855, upon this branch of international law, as interpreted by the courts, and by the State Department, was a statute by which the United States claimed the right, to transfer the allegiance of foreign born women who married American citizens, *ipso facto*, by such marriage, regardless of the residence of the wife, or whether she ever came to the United States.

These cases are cited, to the point, that it cannot be presumed in fairness, to this branch of international law, or comity, that the United States intended to claim and exercise such a right or power, and at the same time deny a similar operation to the same principle of international law or comity, when it operated *conversely*, as to the marriage of American women to foreigners, whose sovereign had declared under this international comity, that by such marriage the wife was deemed to be a subject of the sovereign of her husband.

This would be an *inconsistency*, which the learned judge in *Pequignot v. Detroit*, *supra*, (1883) thought should not be attributed to Congress, but that on the

contrary it should be *implied* from said Act of 1855, that Congress intended the same rule to operate conversely, as to American women.

As is shown by large numbers of citations in this brief, the State Department followed the doctrine announced in *Pequignot v. Detroit*, supra, but by reason of the decision in *Comitis v. Parkerson*, supra, there were some expressions prior to 1907, that the matter was not deemed *incontrovertibly* settled. And in the report of the Citizenship Commission of 1896 (House Document No. 326, supra), which recommended the Act of March 2, 1907, and reviewed all the decisions and department rulings bearing upon the subject, it was specifically pointed out at page 33 of such report, that this *conflict* existed between the said cases of *Piquignot v. Detroit*, and of *Comitis v. Parkerson*, where the committee speaks of the cases, after citing the same and referring to the facts in each, as follows:

“Yet the spirit of the two cases is opposed, and it may be doubted if both can stand.”

The committee then immediately proceeds to point out that this conflict, unless settled in favor of the doctrine laid down in *Pequignot v. Detroit*, will lead to the evils of claims of *dual allegiance*, and recommends the adoption of the doctrine of *Pequignot v. Detroit*, as the *sounder* view. The following is the language of the committee report upon this point at page 33:

“It may be stated in conclusion that, if the courts take the position announced in *Comitis v. Parkerson*, and also follow the holdings in such cases as

Ware v. Wisner, *supra*; Halsey v. Beer, *supra* (to the effect that an alien woman non-resident marrying a non-resident American citizen becomes thereby an American citizen), and if foreign countries assume the same position we shall have in every case of naturalization by marriage, for which naturalization the statutes of England, France, Germany, and America provide, a case of *dual allegiance*, because under the rule announced in Halsey v. Beer, the King of Italy might insist that the native-born citizen wife of Augustine Comitis became a subject, by that marriage, of Italy, and it must be deemed *immaterial*, under the decision of Halsey v. Beer, that the husband in the Comitis case was a *permanent resident of America*. *From the standpoint of comity and the avoidance of conditions of dual allegiance, the decision in Pequignot v. Detroit, seems the sounder.*" (The italics are ours.)

This shows conclusively that the committee whose report Secretary Root transmitted to the House *with his commendation*, (see Report, page 2) deemed it essential to confirm by statute the doctrine of Pequignot v. Detroit, which was to the effect that the wife, an American citizen, by marriage transferred her allegiance to France, although *both she and her husband remained residents* in the State of Michigan.

Under such circumstances, with this report before us, it is utterly impossible to mistake the direct purpose of Congress in the Act of March 2, 1907, to effect *an immediate transfer of allegiance upon the occurrence of the marriage* in the United States as well as elsewhere. The language is plain, unequivocal and even *mandatory*, and without qualification.

The suggestion that the Court should interpolate a qualification that the transfer of allegiance is to take place only when the wife resides abroad, is absolutely inadmissible and is absolutely precluded.

In *Pequignot v. Detroit* the *same suggestion* was evidently made, for at page 215 the Court says:

“There is no exception in the statute of marrying foreign women *and residing abroad*, and I know of no authority for interpolating one.”

The Act has also been construed to mean that the wife takes the citizenship of her husband *immediately* upon the marriage by all the Courts which have referred to the statute since its enactment. (See *In re Rionda*, 164th Federal 368, 1908, and *U. S. v. Cohen*, 179th Federal 835, *supra*.)

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## IX.

**THE TRANSFER OF ALLEGIANCE OF A WOMAN MARRYING A FOREIGNER RESTS UPON INTERNATIONAL LAW OR COMITY, AND THE CASE OF SHANKS v. DUPONT, DOES NOT HOLD THAT THE REMOVAL OF THE WIFE IS NECESSARY.**

The denial by opposing counsel that the transfer of allegiance effected by marriage, rests upon principles of international law, as evidenced by the consent of nations, is a denial of an elemental doctrine sustained by all writers upon the subject of nationality, and confirmed by the Courts.

We have already seen by the quotation from *Pequignot v. Detroit*, *supra*, that the learned Judge uses the following language:

“It seems to me, too, that we should regard the sections above quoted as announcing the views of Congress upon this branch of *international law*, etc.” (The italics are ours.)

We have referred in this brief to a large number of the statutes of various nations in uniform harmony, to effect this transfer of allegiance upon marriage to foreigners, and also to the declaration of Mr. Cockburn that the same rule obtains in all nations. International law ‘*jus gentium*’ implies of necessity, principles which rest upon the consent of more than one nation, and also that the principle is to be operative equally in the territory of all the nations consenting thereto. While in the absence of statutory evidence of the acceptance, it may be ascertained by judicial decision; yet every nation is at liberty to evidence its acceptance of the principle, by statute, and when this is done the statute becomes the measure of the operation of the doctrine, principle or comity, within the territory of that nation.

As to the assertion of opposing counsel that expatriation needs no consent of the government, there is *a sense* in which this is true, where it is founded absolutely upon *actual emigration*, and permanent withdrawal from a country. This doctrine, however, even in Rome, was based upon a mode for evidencing formal departure, and in modern nations it rests upon declaratory legislative enactments evidencing an assent to the principle, so that this so called inherent right of departure, in a sense rests upon the acquiescence of nations. However that may be, a transfer of allegiance *by marriage*, or what is called, “*naturalization by marriage*”, is an entirely different and *separate mode*, of

changing allegiance, and does not rest essentially upon the idea of departure, but rests upon the doctrine of international law or comity, *provided by the nations* for that *specific purpose*, and contemplates allegiance acquired by marriage, to operate within the territory of the sovereign to whom the wife owed former allegiance, as well as elsewhere, *if such sovereign has consented*. It is at this point that consent is material to naturalization by marriage, namely, that it cannot operate *against the will* of the former sovereign of the wife within his territory, but does so operate if such sovereign has consented. (See Mrs. Gordon's case and other authorities cited in Point XI of this brief and in said House Doc. 326, page 31.)

The case of Shanks v. Dupont, 3 Peters, 242, seems to be misunderstood by counsel for petitioner. That case never held that removal or *departure from the country* after marriage to a foreigner was necessary to *transfer allegiance* of the wife. It was not held in that case that the wife became a British subject in *consequence of her marriage accompanied by an actual removal* to Great Britain. It was held that the marriage had nothing whatever to do with her becoming a British subject. The decision was that the wife became a British subject, by reason of the *Treaty of Peace of 1783*, between the United States and Great Britain, by virtue of her having *adhered* to Great Britain, within the meaning of the *terms of such Treaty*. This case was decided in 1830 upon the following facts:

Ann Scott was born a British subject before the war of the Revolution in South Carolina. By the Declara-

tion of Independence (1776), she was held to have become a citizen of South Carolina. In 1781 she married Shanks, a British officer in South Carolina. In December, 1872, she went with him to Great Britain, where she remained until she died. *In 1783 said Treaty of Peace* was made. Her children claimed an estate in South Carolina through the mother, to which they were only entitled if she was a British subject.

At page 246, the Court, after declaring that the marriage did not dissolve her allegiance to South Carolina, giving as the reason, *that no person can by any act of their own without the consent of the Government put off their allegiance*, proceeds to inquire if Mrs. Shanks became a British subject *by reason of such Treaty of Peace*, and holds that she did, and that her removal to, and remaining in Great Britain constituted her *adherence*, to Great Britain under the *terms of that Treaty*, and *thus* made her a British subject.

Justice Story, in delivering the opinion in that case, also recognizes that the nationality of married women is governed by *international law*. It evidently had been argued in that case, that the incapacities of married women, which existed by virtue of the provisions of the English Common Law, prevented her from having sufficient separate legal individuality, to elect to *adhere* to the British side under the terms of said Treaty of Peace of 1783. The learned Justice controverts that suggestion at page 248 by the following language:

“The incapacities of *femes covert*, provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their ac-

quiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, *but stand upon the more general principles of the law of nations.*" (The italics are ours.)

Here the learned Justice clearly affirms the principle that whatever may be the status *where there is no acceptance* of the international law or comity, that the *national character* of a native woman, married to an alien *stands upon the principles of the law of nations.* At the time these words were written neither Great Britain, nor the United States had given their *consent* to the doctrine of a transfer of allegiance of a native born woman by marriage to an alien, and it was held that *without such consent*, a woman could not transfer her allegiance by marriage to a foreigner, but the court in expressing that view makes it *clear* that it recognized *even then*, that *if it were not for this principle*, that marriage would *ipso facto* transfer the allegiance of the wife. The language of the court upon that point on page 246 is as follows:

"The general doctrine is, that no persons can, by any act of their own, without the consent of the government, put off their allegiance, and become aliens. If it were otherwise, then a *feme alien* would, by her marriage, become, *ipso facto*, a citizen, and would be dowable of the estate of her husband; which is clearly contrary to law."

Now this language of the Court is a clear assertion that if it were not for the doctrine of perpetual allegiance, *then held*, by Great Britain and the United States, or the refusal of government to *consent* to transfer of

allegiance by marriage to a foreigner, that such marriage *would* operate *ipso facto* to make the wife a citizen. There is no limitation or qualification of the principle as stated by the Court. *All women are aliens* to the country of a *foreign* husband, until the marriage. The Court clearly recognized the *existence of a principle* by which such marriages would transfer the allegiance of the wife, *ipso facto, if governments gave their consent.*

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## X.

THE CLAIM OF OPPOSING COUNSEL THAT AT THE TIME OF THE STATUTE OF 1907, IT WAS THE SETTLED LAW OF THE UNITED STATES THAT AN AMERICAN WOMAN MARRYING AN ALIEN DID NOT LOSE HER CITIZENSHIP, BY REASON OF SAID MARRIAGE, IF SHE CONTINUED TO RESIDE WITHIN THE JURISDICTION OF THE UNITED STATES, IS A MISAPPREHENSION.

Opposing counsel cites several cases under this proposition, none of which support the statement, unless possibly such an inference be drawn from the case of *Comitis v. Parkerson*, *supra*.

We have just seen that the case of *Shanks v. Dupont*, *supra*, did not hold any such doctrine, but held that the wife became a British subject *solely* by virtue of a *treaty, wholly disconnected from her status of marriage.*

All such cases cited by petitioner have their root in a citation of *Shanks v. Dupont*, *supra*, which is only authority for the proposition, that the wife cannot

transfer allegiance by marriage to a foreigner, without the consent of the government.

Mr. Brannan (14th Amendment, page 28) cites *Shanks v. Dupont* and *Comitis v. Parkerson*, and *Pequignot v. Detroit*, *supra*, which last case is to the contrary, and *Shanks v. Dupont* does not support the proposition.

*Beck v. McGillis*, 9th Barbour 35 (1850), Special Term, is based on the doctrine of *perpetual allegiance*, and denies that marriage accompanied by removal, changed the allegiance of the wife (citing *Shanks v. Dupont*, *supra*).

*Ruchgover v. Moore*, 104th Fed. 947, is not in point, and is distinguished in this brief. In that case the wife actually resided abroad, and the decision is dictum.

15 Opp. Attorney General, 599, is placed upon the ground that the United States had not consented (citing *Shanks v. Dupont*, *supra*). The writer of the opinion, after saying that the widowhood *did not result in loss* of American citizenship, adds as follows:

“This being so her subsequent marriage did not affect such condition (3 Peters 242).”

3 Peters 242 is the case of *Shanks v. Dupont*, *supra*, and therefore the opinion decides nothing more than that the wife could not transfer her allegiance without the consent of the government.

10 Opp. Attorney General, 321 (1862), does not touch the point, as it holds that an American woman who married a Spaniard, and went to Spain with him, and resided there with him until after his death, having chil-

dren born there, did not lose her American citizenship by *both marriage and removal*. No authority is cited and Judge Brown, in *Pequignot v. Detroit*, *supra*, referring to this opinion at page 216, says:

“He held that the removal of the lady and her daughter to Spain, and their residence there, were no evidence of an attempt to expatriate themselves. I think it would be difficult to give any sound reason for this conclusion.”

The case of *Moore v. Tisdale*, 5 B. Monroe (Ky.) 352, falls under the same category. All that is said on the subject is *dictum*, as the husband was *dead*, and the wife had again returned to the United States, where she had remained without any intention of ever again residing in Texas. (See page 354.) Under the principles laid down by the court in that case, her citizenship had *reverted*, and the *dictum* that a wife ought to have the right to remove to a foreign country with a foreign husband and live with him there until his death, without at any time becoming an alien is unsupported by any authority and is not even relevant to petitioner's claim. The early cases of *Talbot v. Jansen*, 3 Dallas 131 (1795), and *Santissima v. Trinidad*, 7th Wheaton 283 (1822), *Inglis v. Sailor's Snug Harbor*, 3rd Peters 99 (1830), are all cases decided during the acknowledgment of the principle of *perpetual allegiance*, and also all *relate to male citizens* under circumstances, *where emigration is concededly necessary*, and none of the cases related to the international principle, of transfer of allegiance by *marriage* to a foreigner.

The true state of the law at the time of the enactment of the Act of 1907, was as follows:

The case of *Shanks v. Dupont*, *supra*, and all similar cases based upon the doctrine that consent of government was a necessity had fallen under the rule of "*Cessante ratione*", according to the view taken in *Pequignot v. Detroit* (1883), and a long line of decisions to the same effect by the State Department, which had finally accepted the doctrine of that case as its rule of action.

As long ago as the year 1898 (nine years before the Act of 1907), the State Department at Washington, in its instructions to Mr. Wildman, Consul to Hongkong, No. 30, March 24 (1898), made the following statement:

"It is the practice of the Department of State to decline to issue passports to the American-born wives of foreigners, who continue to reside in the United States after marriage." (Moore's Dig. Int. Law, vol. 3, page 454.)

This is further reinforced by the letter of Huntington Wilson, Acting Secretary of State, to Mr. Kent, dated March 13, 1912, *supra*, in which, after stating that the Department of State had held that under the Act of 1907, an American woman loses her citizenship upon her marriage to a foreigner, whether she resides abroad or remains in this country, he adds as follows:

"For many years before the passage of the Act of 1907, the practice of this Department conformed to this general international rule."

It will thus be seen that the only case which held to the contrary, or that a removal by the wife was necessary (at the time of the passage of the Act of 1907), was *Comitis v. Parkerson*, *supra*, and that case was dictum in this sense, namely,

The foreign husband *was dead* and the widow continued to reside in Louisiana, and therefore was an American citizen, under the doctrine of *reversion of citizenship*, as at that time held in the United States.

It was this state of affairs, namely, the conflict between *Comitis v. Parkerson*, *supra*, and *Pequignot v. Detroit*, *supra*, which led the Citizenship Commission in its report, favoring the Act of 1907, to call the attention of Congress at page 33 of said report, to the conflict between these two cases, and point out that both could not stand, and that if *Comitis v. Parkerson* were followed it would result in claims of *dual allegiance*, and to close the recommendation upon that point, with the following words:

“From the standpoint of comity and the avoidance of conditions of *dual allegiance*, the decision in *Pequignot v. Detroit* seems the sounder.” (The italics are ours.) See Report, page 33.

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## XI.

THE RUSSIAN CASE OF MRS. GORDON, AND OTHER SIMILAR AUTHORITIES HOLD THAT A WOMAN BY MARRIAGE TO A FOREIGNER, TAKES THE SAME NATIONALITY AS THE HUSBAND, IN ALL THE COUNTRIES OF THE WORLD, AND THAT THE EFFECT IS THE SAME IN THE COUNTRY OF HER NATIVITY AS ELSEWHERE, IF HER FORMER SOVEREIGN CONSENTS.

Opposing counsel cites the case of Mrs. Gordon, which declares the above doctrine, but we think he *omits that portion* of the decision which states the rule directly against his contention. The quotation from the instruc-

tions by Mr. Fish, Secretary of State, to Mr. Jewel, June 9, 1874, is taken from Moore's International Law Digest, vol. 3, page 457, and is as follows:

"Under the Act of February 10, 1855, an alien woman upon her marriage to an American citizen, acquires the right to be regarded by the authorities of the United States as an American citizen, in every country except that to which she owed allegiance at the time of her marriage."

The matter so quoted from said page 457, is partly from Mr. Fish, and partly from Mr. Moore, as will be seen by reference thereto. The remaining portion, however, of Mr. Moore's statement with reference to that matter immediately following is as follows:

"It may be, however, that by the law of such country she is regarded as becoming by her marriage a foreigner. In such case no conflict of law would arise, since the government of her original allegiance would concede her full American citizenship."

This statement contains the *essence* of the whole controversy and destroys the contention of opposing counsel, because if the government of the woman's nativity *has consented* to the transfer of allegiance, then she does not *owe allegiance* to that country after the marriage, and becomes the citizen of her new sovereign, or assumes her new nationality, *as well while residing in her native country, as elsewhere*, and this is the exact doctrine as stated by Mr. Fish to Mr. Jewel in *Mrs. Gordon's case*, as found at pages 461 and 462. Moore's Int. Dig. Law, *supra*, Sec. 412, which section is referred to by Mr. Moore at page 457, as follows: "Quoted *infra* sec. 412."

From the official instructions *so found at pages 461, 462, sec. 412*, we ascertain that Mrs. Gordon was a Russian woman, of the Hebrew faith lately married to Mr. Gordon, an American citizen, and residing in Russia, for the question is presented as to whether or no she (being a Jewess and subject to expulsion as a Russian citizen, because of her faith, was free from the operation of such laws of expulsion by reason of her having become the wife of an American citizen). The answer to such an inquiry shows that it related to the status of the wife while she was a resident of Russia, and having never come to the United States, and the instruction shows, that Mr. Fish declared that she could become by such marriage, a citizen of the United States *while remaining in Russia as well as elsewhere, if the Russian law regarded a subject marrying a foreigner, as a foreigner*, and that the only question, if any, was as to the actual state of the Russian law upon that point. We quote the entire correspondence as so quoted in Sec. 412, Moore's Int. Dig. Law, which is as follows:

"I have your dispatch No. 68, respecting the case of Mrs. Gordon, formerly Topaz, a Russian woman of the Hebrew faith, who has lately married an American citizen. It is understood that by the laws of Russia she could not, while a subject of Russia, remain in the empire without renouncing her faith and accepting Christianity. You wish to know whether by her marriage to an American such a person, under the statutes of the United States and the first article of the treaty of 1832 with Russia, acquires the right to be exempt from the operation of the municipal laws of Russia.

"The statute of the United States regulating the status of alien women married to American citizens was approved on the 10th of February, 1855.

(10 Stat. L. 604.) By this statute it is enacted 'that any woman who might lawfully be naturalized under the existing laws, married or who shall be married to a citizen of the United States, shall be deemed and be taken to be a citizen.'

"The Attorney-General of the United States, in construing this statute, has held 'that irrespective of the time or place of marriage, or the residence of the parties, any free white woman, not an alien enemy, married to a citizen of this country, is to be taken and deemed a citizen of the United States'. (Williams, At.-Gen., 1874, 14 Op. 402, 406.)

"There can, therefore, be no doubt that such a person would, upon her marriage to an American citizen, acquire the right to be regarded by the authorities of the United States as an American citizen in every country except that to which *she owed allegiance* at the time of her marriage.

"It is understood at the Department that the laws of Russia regard a Russian subject marrying a foreign husband as a foreigner. *In such case no conflict of law could arise*, because the Russian government would concede the full American citizenship of the married woman. But should it be otherwise, her relations to that government would be affected by another opinion of Attorney-General (Hoar, At.-Gen., 1869, 13 Op. 128), that while the United States may by law fix or declare the conditions constituting citizens of the country within its own territorial jurisdiction, and may confer the rights of American citizens *everywhere*, upon persons *who are not rightfully subject to the authority of any foreign country or government*, it ought not, by undertaking to confer the rights of citizenship upon the subject of a foreign nation, *who had not come within our territory*, to interfere with the *just rights* of such nations to the government and control of its own subjects." (Italics are ours.)

This doctrine has never been disputed. In *Pequignot v. Detroit*, *supra*, Judge Brown examined the Code Napoleon to see that it claimed the wife as the subject of France, and Mr. Justice Brown *inferred* the consent of the United States, because of the Act of 1855. The same doctrine is laid down in *United States v. Williams*, and *United States v. Gendering*, 173 Fed. Rep., page 626, and the learned Judge, on pages 627, 628, examines the state of international law or comity, as it exists in the Turkish Empire, and in Holland, in order to see that those respective nations *had consented to the transfer of allegiance*. In both of these cases the wife became a citizen of the United States *while residing in the country of her nativity*, by virtue of the operation of such international comity. (These cases were affirmed by the Circuit Court of Appeals, 184 Fed. 322.)

To the same effect are the cases of

*Halsey v. Beer*, 52nd Hun. (Sup. Ct. Rep. N. Y.) 366;

*People v. Newell*, 28 Hun. (Sup. Ct. Rep. N. Y.) 79;

*Kane v. McCarthy*, 63 N. C. 299;

*Headman v. Rose*, 63 Ga. 458;

*Ware v. Wisner*, 50 Fed. Rep. 310,

and other cases previously cited in this brief.

See the same effect, letter Huntington Wilson, Acting Secretary of State to Mr. Kent, March 13, 1912, *supra*.

## XII.

THE ACT OF 1907, IS IN CLEAR AND SPECIFIC TERMS, AND MANDATORY IN ITS EXPRESSION, AND INTENDED THE TRANSFER OF ALLEGIANCE TO BE IMMEDIATE UPON MARRIAGE. AND DID NOT CONTEMPLATE LEAVING OPEN ANY QUESTION AS TO THE NATURE OF RESIDENCE ABROAD. THE ACT HAS BEEN SO INTERPRETED, BY THE STATE DEPARTMENT AT WASHINGTON, AND ALSO BY THE FEDERAL COURTS.

Opposing counsel refers to the title of the Act of March 7, 1907. The title to an Act is not referred to unless the text be ambiguous, which is not the case here. The title to this Act, however, lends no support to the contention made by petitioner. Counsel for petitioner would evidently *like* to read the title by *transposition*, and to enact it to suit himself.

This is the only manner of reading the title by which he can apply the word "ABROAD", to the subject of expatriation.

But there are many insuperable obstacles to any such idea, or that the word "ABROAD" is used in any such sense. The title of the Act *is* as follows:

"AN ACT IN REFERENCE TO THE EXPATRIATION OF CITIZENS AND THEIR PROTECTION ABROAD."

And the signification is the same as if it read as follows:

"AN ACT IN REFERENCE TO THE EXPATRIATION OF CITIZENS AND CITIZENS PROTECTION ABROAD."

The word "THEIR", refers to the word "CITIZENS" preceding, and is the usual substitute for a repetition of

the word "CITIZENS". No one can claim for a moment any other signification than this. Language will not admit of any other or different interpretation. In other words, *both subjects*, expatriation of citizens, and the protection of citizens abroad, are dealt with separately, by the Act.

There is no such thing known to the law as protection abroad, of expatriated citizens. Our citizens who have become expatriated, are no longer United States citizens, abroad, or elsewhere. Expatriated persons are citizens of a new sovereign, and are under the protection of the new sovereignty. The Act and the title to the Act plainly deal with the subject of the expatriation of citizens generally, and with the protection of citizens abroad. The specific reference in the text of the Act, to *protection* of citizens, is of such as are abroad.

Section 1 of the Act, naturalizes a person in a qualified sense, who has declared his intention to become a citizen of the United States, and to such an extent, that it declares such a person to be entitled to the *protection* of the United States, "in any foreign country", to the extent and under the conditions mentioned in that section.

Section 6 of the Act provides that children born abroad of American parents, who continue to reside outside of the United States shall, in order to receive the *protection* of this government, be required upon reaching the age of eighteen years to make a certain consular record, and take an oath of allegiance.

Thus it appears that the Act by its *text specifically limits* the *protection* which it extends to citizens to those who are abroad. This is *not the case*, with reference to all the sections which deal with expatriation. Section 3 of the Act is absolutely unequivocal and without any qualification, namely:

“That any American woman who marries a foreigner shall take the nationality of her husband.”

Here is no qualification of any nature whatever. It does not say a woman “who marries a foreigner abroad” nor does it add the words “if she remove from the country”.

The kind of protection to American citizens which is extended by Sections 1 and 6 of the Act *cannot possibly occur anywhere except abroad*, but the *marriage* which is referred to in Section 3 of the Act *can occur anywhere*, as well on American soil, as abroad.

No words of limitation or qualification of the kind suggested, can be interpolated without rank judicial legislation, or without destroying the plain, clear language of Congress and its clear intent. A similar suggestion meets a reply in *Pequignot v. Detroit*, *supra*, at page 215, where counsel had evidently suggested such interpolation by construction, in the Act of 1855 there referred to, and the Court says:

“There is no exception in the statute of marrying foreign women *and residing abroad*, and I know of no authority for interpolating one.”

Again, this Section 3 provides *two distinct* modes of *resuming citizenship*, one method where the widow is

abroad, at the termination of the marital relation, and the other where she is residing in the United States at the termination of the marital relation. It is clear that the intention is that the change of nationality is *coexistent* with the marital relation, and until resumed as provided. And this view is the only one that is in *harmony* with the claim which the United States makes, as to its right and power, under and by virtue of the Act of 1855, as cited in *Mrs. Gordon's case*, supra, and the vast array of cases to the same effect cited in this brief.

The report of the Citizenship Committee selected in 1906 (House Document No. 326, 59th Cong., 2nd Sess.) shows that the intention was to deal with the subject of expatriation *generally*, and also of protection of citizens abroad.

As has been shown, the subject of expatriation had never before been defined by Congress, and it was therefore desirable to deal with the subject *generally*, in all its phases. It was also desired to deal with the subject of protection of American citizens abroad, and we find at page 1 of *said report* the following:

“On the 13th of April, 1906, the Senate passed the joint resolution providing for a commission to examine into the subjects of citizenship of the United States, expatriation, and protection abroad.”

On the same page we find the following: That on the 6th of June, 1906, the House Committee on Foreign Affairs reported a resolution opening as follows:

“It is the opinion of the Committee that legislation is required to settle some of the embarrassing

questions that arise in reference to citizenship, expatriation, and the protection of American citizens abroad."

These quotations show that each of these subjects were to be dealt with generally, save, that, as is said in said report of the House Committee on Foreign Affairs, *protection* was being dealt with only as to American citizens abroad, viz., "And the protection of American citizens abroad." (Expatriated persons are not American citizens.)

At page 5 of said report we find the *contents*, made up under four separate and distinct titles, as follows:

- "I. Protection of American citizens abroad—  
Recommendations  
Observations
- II. Protection abroad of those who have made the declaration of intention to become citizens
- III. Expatriation—  
Recommendations  
Observations
- IV. Citizenship of married woman and of alien-born minor children—  
Recommendations  
Observations"

At page 7 the heading to the first portion of the report is as follows: "I. PROTECTION OF AMERICAN CITIZENS ABROAD."

At page 19 of the report the heading of the second portion thereof is as follows:

"II. PROTECTION ABROAD OF THOSE WHO HAVE MADE THE DECLARATION OF INTENTION TO BECOME CITIZENS OF THE UNITED STATES."

At page 23 of the report the heading to the subject is as follows:

“III. EXPATRIATION.”

All this shows absolutely that the subject of *expatriation* was dealt with without any *qualification or limitation* whatever, and in a *general and universal* sense.

It is not in any of these places found that the word or subject “EXPATRIATION”, is followed by the word “ABROAD”. No such word nor any qualifying word whatever, is found in connection with that subject matter.

There is another reason which amplifies the express intention of Congress and precludes any qualification of its language. Prior to the Act of 1907, when a naturalized citizen went abroad, the *burden* was upon the United States, in case of complication arising over the question of his citizenship, to prove that the removal or residence abroad, was *intended* to be *permanent*, as distinguished from a *temporary* residence, which latter might extend over years, or even a lifetime, without being of such a nature as to operate by way of expatriation. This gave great difficulty to the State Department, and it was one of the fundamental purposes of the Act of 1907, to put an end to that situation and *shift the burden* to such person so returning to his native country, if he remained there for more than *two years*, by declaring a residence for that length of time and under such conditions *presumptive* of expatriation. (See Section 2, Act 1907.)

Now it is impossible to believe that the Congress would deliberately take *this step* and proceeding by the

terms of this Act of March 2, 1907, and yet at the *same time intend* to make the marriage of an American woman to a foreigner, operate as expatriation *only* upon her going abroad, *without*, at the same time fixing some period of such residence abroad which should determine whether the removal should be *presumptively permanent*.

In addition to all the foregoing, we have before us the fact that the Department of State, under Secretary Root, who transmitted the report of the Citizenship Committee, recommending this legislation, construed the Act of March 2, 1907, as to the Section 3 to mean that it applied in such manner that an American woman by marriage to a foreigner loses her citizenship, although she *remain* in the United States. (See letter of Huntington Wilson, Acting Secretary of State, to Mr. Kent, March 13, 1912, *supra*, stating the ruling of the State Department as to the effect of said Act.) We have also the decision of the District Court, S. D. N. Y., 1908 (164 Fed. Rep., page 368).

In *re Rionda*, *supra*.

Also the decision of the Circuit Court of Appeals, 2nd Circuit, N. Y. (1910) 179 Fed. Rep., 835 U. S. v. *Henrietta Cohen*, *supra*.

Both of these cases (which are the only cases referring to the construction to be given to the said Act of March 2, 1907, aside from the construction by the State Department), interpret Section 3 of said Act to mean that the wife so marrying a foreigner in the United States, becomes *immediately*, a citizen of the country of her husband.

DOES THE ACT OF 1907 APPLY TO MARRIAGES BEFORE THAT  
ACT?

In the case at bar, the plaintiff in error was married *subsequent* to the said Act of March 2, 1907. The Supreme Court of California leaves the point whether said Act includes an American-born woman who married a foreigner *before* such Act of 1907, *undecided*.

We hope this Court will *decide* this point. It seems we should not have to come back to this Court in another case to get this brief Act of Congress fully interpreted in this respect.

In *Kelly v. Owen*, 7 Wall 496, this Court held that the Act of Congress of February 10, 1855, *supra*, refers to "a state of marriage". The Department of State construes the Act of March 2, 1907, to apply to women married *before* as well as after said Act. (See *Huntington Wilson*, Acting Secretary of State to Mr. Kent, March 13, 1912. *Mss.*, *supra*), where it is said:

"For many years before the passage of the Act of 1907, the practice of this Department conformed to this general international rule."

We have also seen that in *Pequignot v. Detroit* (1883) *supra*, the Court, in construing the said Act of February 10, 1855, implies that it was the intent of Congress that the rule there enacted should operate *conversely*.

We have also seen that it was the purpose of the committee making the report upon which the Act of March 2, 1907, was enacted, to secure statutory force to the doctrine asserted in *Pequignot v. Detroit*. In the view of the Department of State, this Act of March 2, 1907, was a mere *codification* of a rule of international

law, or comity, which had been in operation at least since 1855, under the doctrine of *Pequignot v. Detroit*, *supra*.

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#### IN CONCLUSION.

Opposing counsel expresses the fear, that if Congress has the power of expatriation in the manner claimed, that it may abuse that power. This objection may be made to every grant of power, and is fully answered in *Talbot v. Jansen*, 3 Dallas 131. The Court in that case had expressed the view that an expatriation Act by Congress was much needed, and Justice Iredell says, at page 163:

“The supposition, that the power may be abused, is of no importance if the public good requires its exercise. This feverish jealousy is a passion that can never be satisfied. No man denies the propriety of the legislature having a taxing power. Suppose, it should be seriously objected to, because the legislature might tax to the amount of 19s in the pound? They have the power, but does any man fear the exercise of it? A legislature must possess every power necessary to the making of laws. When constructed as ours is, there is no danger of any material abuse. \* \* \* But is there no danger of abuse on the other side? Have not all the contentions about expatriation in the courts, arisen from a want of the exercise of this very authority? For if the legislature had prescribed a mode, every one would know whether it had or had not been pursued, and all rights, private as well as public, would be equally guarded; but upon the present doctrine no rights are secured, but those of the expatriator himself.”

The objection that the law is not *uniform*, because it does not apply *to men* as well as to women, is without merit. The uniformity required in naturalization law, does not prevent proper classification. The law as to naturalization must be uniform in the sense that it must operate uniformly in all places.

The Federal Constitution contains no clause requiring laws general in their nature to be uniform in their operation. The power of expatriation is not exercised under and by virtue of the specific grant of power as to naturalization, and therefore Congress may classify as it pleases in the exercise of the power.

Opposing counsel also is mistaken in supposing that the Act would be unconstitutional, if it did apply *to male* as well as female citizens. The international policy which has fixed the international principles, upon which, or by which, with the consent of sovereigns the *status* of international marriages is determined, has not deemed it expedient to apply the doctrine *conversely*, but if they had done so there would be nothing unconstitutional in an Act of Congress consenting to the operation of such an international principle.

The criticism which is made by opposing counsel upon the observation made by the learned Judge in *Pequignot v. Detroit*, *supra*, and referred to in *U. S. v. Cohen*, *supra*, that, "it will be noticed that legislation upon the subject of naturalization is constantly advancing toward the idea that the husband, as head of the family, is to be considered its political representative, at least for the purposes of citizenship", is without merit. Such was the tendency of the British Acts of 1844 and 1870,

and the American Acts of 1855 and 1907. Opposing counsel thinks it is archaic, and points out that there is a gradual extension of the right of suffrage to women.

Counsel entirely misconceives the meaning of the language of Judge Brown. The learned Judge was there speaking of *international political policy*, for he was referring to *international subjects*, viz., naturalization and expatriation, and had no reference whatever to those political powers, which are exercised under municipal law by the grant of the right of suffrage.

The word "political", as used by the learned Judge, was used in the same sense that it was used by Justice Story, in *Shanks v. Dupont*, page 248, where he says:

"The incapacities of *femes covert*, provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their *acquiring or losing a national character*. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the *more general principles of the law of nations*." (The italics are ours.)

The statement of counsel for plaintiff in error that she *intends* to continue to reside in the United States, or in California, in no way changes her status under this international marriage. We have already shown that the Act is without qualification, and operates *ipso facto*, by the fact of marriage, and that the wife *immediately* takes the nationality of the husband, or transfers her allegiance, and that both the State Department and

the Federal Courts in New York in the cases cited have ruled that such is the interpretation and meaning of the Act.

Counsel will not claim that the Act is open to *two* different operations, one as to a person who merely states that she was married in the United States and still resides therein, and an opposite operation upon one who states, that she intends to continue to reside therein. The *status* is fixed at the *instant marriage is completed*, and continues during the marital relation, and until a resumption of the former nationality, in the manner provided.

*Intention* is purely evanescent. It may be reversed in an hour. The *status* of international marriages is not based upon anything so fleeting and inconstant. The reference in *Comitis v. Parkerson*, *supra*, to the fact that the husband and wife had lived continuously without intent to leave Louisiana, until the death of the husband, was based upon a state of facts which had *completely transpired*, for the husband was *dead*, and the marriage at an end, and it is added, that the *husband had forever severed himself from Italy*. The learned judge could not have made this statement unless the husband had been dead, for prior to his death no statement of *intention* would have been proof of any such *accomplished situation*. However, the matter is immaterial, as the *decision* of the learned judge *was not placed upon any such point*, but upon the point, that government had never given its assent to her transfer

of allegiance by marriage, while remaining in the United States. The Citizenship Committee in its report (House Document 326, *supra*) at page 33, says:

"It must be deemed *immaterial*, under the decision of *Halsey v. Beer*, that the husband in the *Comitis* case was a permanent resident of America. From the standpoint of comity and the avoidance of conditions of *dual allegiance*, the decision in *Pequignot v. Detroit*, seems the *sounder*." (The italics are ours.)

But in addition to all the above, such reference to such facts in *Comitis v. Parkerson*, *supra*, are utterly *immaterial now*, for at the time that case was decided the judge spoke in the *absence* of any statute by Congress. The petitioner must seek a remedy from the political branch of the government, either from the State of California, to extend the right of suffrage to her, or from Congress, if it is willing to modify its international policy. The duty of the respondents is plain. The affidavit of registration prescribed by law contains as its very first declaration under oath (Political Code of California, Sec. 1097):

"The undersigned affiant, being duly sworn, says: I am or will be a citizen of the United States at least ninety days prior to the next succeeding election."

The Penal Code of the State of California provides as follows:

"Section 42a. Every person who wilfully causes, procures, or allows any other person to be registered in any registrar of electors required by law to be made or kept, knowing him not to be entitled

to such registration, is punishable by imprisonment in the State Prison for not less than one nor more than three years."

The judgment should be affirmed.

Respectfully submitted,

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